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JURISDICTIONAL STATEMENT NO.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

ARKANSAS PUBLIC SERVICE COMMISSION ..... *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ..... *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT

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ARKANSAS PUBLIC SERVICE COMMISSION — *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION — *Appellees*

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Eastern District of Arkansas entered on 28th day of December, 1956, dismissing plaintiffs' complaint to enjoin the order of the Interstate Commerce Commission, September 4, 1956, regarding increased freight rates and charges in the State of Arkansas, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Eastern Division of Arkansas is reported in 147 F. Supp. 454, a copy of which is attached as an appendix hereto. The opinion of the Interstate Commerce Commission is reported at 298 ICC 547.

JURISDICTION

I

This is an action brought by the Arkansas Public Service Commission to annul, set aside, and enjoin an order of the Interstate Commerce Commission entered under Section 13 (4) of the Interstate Commerce Act, 49 U.S.C.A. Section 13 (4), fixing intrastate rates for the transportation within Arkansas of a certain class of commodities after a finding that the rates made or imposed on such commodities by authority of the State of Arkansas caused undue, unreasonable, and unjust discrimination against interstate commerce.

II

The final judgment of the United States District Court for the Eastern District of Arkansas was entered on December 28, 1956. Notice of appeal was filed in said Court on 28th day of February, 1957. By order entered on 23rd day of April, 1957, the time for docketing this appeal was extended to 22nd day of June, 1957.

III

The jurisdiction of this Court to review on appeal all final judgments of the District Court is conferred by 28 U.S.C.A. Section 1252, 62 Stat. 928.

IV

Cases which sustain the jurisdiction of this Court to review on appeal the final judgment of the District Court are *King* v. *United States* (1952), 344 U.S. 254, 73 S. Ct. 259, 97 L. Ed. 301; *North Carolina* v. *United State* (1945), 325 U.S. 507, 89 L. ed. 1760, 65 S. Ct. 1260; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R. Co.* (1922), 257 U.S. 563, 42 St. Ct. 232, 66 L.

Ed. 371, 22 A.L.R. 1086; *Northern Pacific Railway Co.* v. *Montana* (1952), 344 U.S. 905, 73 S. Ct. 329, 97 L. Ed. 699.

V

The principal provisions of the Interstate Commerce Act which are involved in this proceeding are as follows:

Sec. 13 (4) [41 Stat. 484, 49 U.S.C.A. Sec. 13 (4)]

Sec. 15a (2) [54 Stat. 912, 49 U.S.C.A. Sec. 15a (2)]

QUESTION PRESENTED

The question presented by this appeal is whether, in upholding as valid and enforceable that portion of the order of the Interstate Commerce Commission prescribing under Section 13 (4) of the Interstate Commerce Act, a certain class of intrastate freight rates in Arkansas on the ground that the order was supported by substantial evidence, did the District Court misapprehend or grossly misapply the standard for determining the substantiality of evidence as approved by this Court in *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

STATEMENT OF THE CASE

This is an appeal from a final judgment of a specially constituted United States District Court of three judges which reviewed an order of the Interstate Commerce Commission prescribing under Section 13 (4) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 13 (4), intrastate rates for the transportation within Arkansas of sand and gravel, crushed stone, asphalt rock and stone, coated, and related commodities all forming the same class of freight rates commonly described as road building aggregates.

The Commission found that the intrastate rates required to be maintained on such commodities by authority of the State of Arkansas resulted in undue, unreasonable,

and unjust discrimination against interstate commerce in violation of Section 13 (4) of the Interstate Commerce Act and ordered such alleged discrimination removed by applying to the Arkansas intrastate rates and charges on the class of commodities the same respected increases as were authorized in Ex Parte cases number 166, 168 and 175 to be maintained on interstate traffic between points in Arkansas and adjoining states.

The Arkansas Public Service Commission on the 9th day of October, 1956, filed its complaint in the District Court to set aside and enjoin the order of the Interstate Commerce Commission. On 28th day of December, 1956, after a hearing, the United States District Court denied the complaint and determined that the order of the Interstate Commerce Commission was valid. Notice of appeal was filed 28th day of February, 1957. By order entered 23rd day of April, 1957, the time of docketing this appeal was extended to 22nd day of June, 1957.

QUESTION PRESENTED IS SUBSTANTIAL

The standard applied by the District Court in this case for determining the substantiality of the evidence, is far from being sanctioned by *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456, is indeed based upon a misapprehension and gross misapplication of the standard approved by this Court in that case.

Some of the important issues raised by this statement are in a proceeding before the Interstate Commerce Commission brought pursuant to Section 13 (4) of the Interstate Commerce Act to raise a certain class of intrastate freight rates to the interstate level;

1. May the Commission consider the evidence introduced and findings of a Section 15 hearing if

the particular evidence is not introduced in the Section 13 (4) proceeding;

2. Is a finding that the intrastate rates are not contributing their fair share supported by the evidence if the record does not reflect a computation of the profits attributable to the particular class and comparison of these profits with those derived from other sources of revenue;

3. Is a finding that conditions incident in intrastate transportation of freight in a particular State are not more favorable than those incident to interstate transportation between that State and adjoining States adequately supported if the record does not compare actual cost incurred in interstate operations with those involved in intrastate operations;

4. Who has the burden of proving that the particuar class of intrastate rates is not contributing its fair share and thus creating a burden on interstate commerce;

5. Is a Section 13 (4) proceeding for a particular class of freight rates a "Revenue" case, and

6. Are the matters presented so substantial as to require plenary consideration, with briefs on the merits and oral argument.

I

MAY THE COMMISSION CONSIDER THE EVIDENCE INTRODUCED AND THE FINDING IN A SECTION 15 HEARING, IN A SECTION 13(4) HEARING

In this case the Three Judge Statutory Court below interpreted the case of *King* v. *United States* (1952), 344

U.S. 254, 73 S. Ct. 259, 97 L. ed. 301, as holding that the finding of the Commission in Ex Parte cases which were heard pursuant to Section 15a (2) should be considered in determining whether a particular rate in a Section 13 (4) is contributing its fair share of the earnings of the railroads. The court based its opinion on the language found at Page 271 of the *King* case which is as follows:

> "In the absence of any showing that it is not applicable to Florida the evidence which forms the basis of the Commissioners nationwide order became the natural basis for its Florida order."

It is not belived that this Court intended that the findings would become the natural basis, but rather that if the evidence introduced in the Section 15a (2) hearing proved that the particular rate was not contributing its fair share, and that same evidence was introduced in the Section 13 (6), then the same evidence would be the natural basis.

In the *King* case the court stated (p. 272-273):

> "Much of the factual material that was before the Commission in Ex Parte No. 162 and Ex Parte No. 166, and the reports in those cases, were before the Commission and the court below in the present proceedings. To permit such material and reports to be applied under Section 15a but not under Section 13 (4) would be contrary to the complementary nature of those sections."

Thus it is believed that this Court in stating the evidence of the Section 15a hearing becomes the natural support for its Section 13 (4) order, did not hold that in considering whether a Section 13 (4) finding is supported by sufficient evidence, the evidence and finding introduced in the Section 15 (4) hearing is to be considered. The lower court stated in effect that even if the evidence in the record would not support the finding of not producing its fair share, sufficient evidence was available when the

Section 15a evidence was considered. The lower court record did not reflect what evidence was introduced in the Section 15a hearing. This is reason enough why the lower court erred in holding "The evidence which forms the basis of the Commission's nation-wide order becomes the natural basis for its (Arkansas) order."

II

DOES THE RECORD SUPPORT A FINDING OF FAILURE OF INTRASTATE RATES TO CONTRIBUTE FAIR SHARE

It is the position of the appellant that sufficient evidence is not contained in an order to support an increase under Section 13 (4) for a particular class of commodities if that evidence does not compare the revenue received with the expenses attributable to the hauling of these commodities. In other words, evidence that the particular rates are causing a burden on interstate commerce is not proved unless the earnings are reflected. These profits should be compared with the profits derived from shipments of this class with profits derived from other classes of revenue and possibly with profits of the same class in Interstate Commerce.

In this particular case the Commission sought to increase the rates for hauling road building aggregates. The evidence reflected that these rates are below the rates promulgated by the Interstate Commerce Commission as to interstate transportation. Evidence was also introduced which reflected that if the new interstate rates were charged and the volume remained the same, additional revenue would be received. This evidence was controverted by statements of shippers that they would not continue to ship by rail. Evidence was introduced which reflected that expenses attributable to railroad operations have increased since the last rate increase. Other evidence showed

that regarding some particular expenses these were higher in Arkansas than other places in the United States. The railroads also introduced evidence that their over-all rate of return was less than the six percent they believe themselves entitled.

Even though evidence was introduced which reflected the revenue received from the hauling of these particular operations, absolutely no evidence was introduced to show the expenses attributable to these operations or evidence which would reflect the operating ratio. It is strongly urged by the appellant that before it could be proved that any particular rate of any class of commodity is not contributing its fair share of earning it must be shown what the particular earnings or profits are for the class of commodity. It is ridiculous to say that the revenue received from the hauling of these commodities is not producing a fair return unless it is reflected what that return or profit is. It is fundamental in accounting that in determining earning or profits income is compared with expenses. If the rate for these commodities was not producing a fair rate of return this could have been readily shown by comparing the intrastate profit for hauling this particular class of rates with other classes of shipments. This could have been done by the use of operating ratios. In the *King* and *North Carolina* cases, the court referred to operating ratios. If the evidence here reflected the operating ratios the Commission could have accurately determined if the class rate was producing its fair share. It can not be denied that if the Commission did not even compare the expenses attributable to these commodities with the income derived from these commodities that they could not determine that the rates were not producing a fair profit.

It is rudimental that in a Section 13 (4) proceeding, regardless of an rates that the Commission may have

prescribed for interstate rates, there must be evidence in the record that reflects that the particular intrastate rate is not ". . . contributing its fair share of the earnings required to meet maintenance and operating cost and to yield a fair rate on the value of the property directed to the transportation service, both interstate and intrastate." *King* v. *United States* (1952), 344 U.S. 254, 270, 73 S. Ct. 259, 97 L. ed. 301.

III

WHAT EVIDENCE IS NECESSARY TO SUPPORT FINDINGS OF SIMILARITY OR TRANSPORTATION CONDITIONS.

The lower court stated that if the intrastate rate was below the interstate rate and the conditions under which interstate and intrastate moved were found to be substantially the same then this was sufficient evidence to justify the raising of intrastate rate. Even if this were true the only evidence introduced regarding similar operations was that the operating officials of the railroads testified that intrastate and interstate shipments usually are carried in the same trains (T.119-120, 134-138, Exhs. 24 to 33); that operating conditions were less favorable because of the Arkansas "Full Crew Law" (T.142); there are three major rivers in Arkansas which subject the railroads to floods and washouts; and the ruling grades are more expensive (T.120-138). The only true test of similarity of operations would be a comparison of the operating ratios of the interstate operations for these particular commodities with operating ratios of the intrastate operations. This would reflect whether or not the operating conditions are the same. No where in the record is there any comparison of interstate operations or of Arkansas operating ratios. No comparison is made with the operating ratios of the Arkansas commodity with that of national average.

Simply stated the proponents did not prove that the operating conditions in Arkansas are different from those in other states or in interstate operations.

IV

WHO HAS THE BURDEN OF PROOF

In the King case the court made the following statement:

> "In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commissioners' nationwide order becomes the natural basis for its Florida order."

If this Court intended, as held by the lower court, that the proponent had made his case when it showed a disparity and the record did not reflect that the intrastate operations were different from the interstate operations this, in effect, places the burden of proving whether a particular rate is discriminatory upon the respondent rather than the proponent. In other words, the proponent would have made his case by the mere showing of a disparity. This would have to be the rule, if the lower court correctly interpreted the holding of the King case. It is submitted that this is not a correct interpretation. In *North Carolina* v. *United States*, 325 U.S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760, this Court held that a "full hearing" must be held and that a "mere disparity" is not sufficient. The court stated (p. 512) as follows:

> "In effect, the commissions' holding was and its argument is here, that Section 13(4) automatically requires complete uniformity in intrastate and interstate rates. That argument is in short that under our national transportation system interstate travelers and intrastate travelers use the same trains; for a state to fix a lower intrastate rate is therefore an undue advantage to the intrastate passengers and an unfair discrimination against

the interstate passengers. If Congress intended to permit such an over-simplified form of proof to establish "unjust discrimination", then its requirement of a "full hearing" was merely surplusage. In fact, it need have provided for no hearing at all since it could have easily stated in its legislation that intrastate rates shall not have been lower than interstate rates. The argument of the Commission in this regard runs counter to the language of Section 13 (4), and would call for a declaration by us that Congress intended by this section to reverse the entire transportation history of the nation."

In the *King* case the court reiterated its position as to "mere disparity". In that case (p. 270) this Court stated:

> "This Court held that the mere disparity between the rates for comparable intrastate and interstate service was not enough *per se* to establish the requisite unjust discrimination."

If this Court had intended to hold that a proponent had made his case on a showing of a disparity it would not have made the foregoing statement. This Court on many occasions has emphasized that intrastate transportation is primarily the concern of the State. *In North Carolina* v. *United States, supra* (p. 510-511), this Court stated:

> "Section 13 (4) does not relate to the Commissions' power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. See *United States* v. *Pennsylvania R. Co.* Nos. 47, 48, decided January 29, 1945 [323 U.S. 621, *ante*, 499, 65 S. Ct. 471]. No such breadth of authority is granted to the Commission over purely intrastate rates. Neither Section 13 (4), nor any other congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to

regulate intrastate rates. Since the enactment of Section 13 (4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commisison nullify a state-prescribed rate.

Interstate transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. *American Exp. Co.* v. *South Dakota*, 244 U.S. 617, 625, 61 L. ed. 1352, 1358, 37 S. Ct. 656, PUR 1917F 45. A scrupulous regard for maintaining the power of state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet "a high standard of certainty." *Illinois C. R. Co.* v. *State Pub. Utilities Commission*, 245 U.S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, PUR 1918C 1279. Before the Commission can nullify a state rate, justification for the "exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U.S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119. See also *Yonkers* v. *United States*, 320 U.S. 685, 88 L. ed. 400, 64 S. Ct. 327. And the intention to interfere with the state's rate-making function is not to be presumed, *Arkansas R. Commission* v. *Chicago, R. I. & P. R. Co.*, 274 U.S. 597, 603, 71 L. ed. 1224, 1228, 47 S. Ct. 724; nor must its intention in this respect be left in serious doubt. *Illinois Commerce Commission* v. *Thompson*, 318 U.S. 675, 684, 685, 87 L. ed. 1075, 1081, 1082, 63 S. Ct. 834. The foregoing cases also stand for the principale that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings supported by evidence, of each element

essential to the exercise of that power by the Commission."

The foregoing language clearly indicates that in a Section 13 (4) hearing the burden of proof should be upon the proponent and the proponent has not proved that a particular rate is discriminatory if the record does not reflect more than a mere disparity. To hold otherwise would do away with the necessity of a State Commission and thus obviate the need for Section 13 (4). In any event, it would place a strenuous burden on the states if they are required to introduce evidence that the particular rate determined by the state is contributing its fair share of the revenue. This is evidence that is in the possession, under the control and more accessible to the proponents. The cost to them of producing such evidence would be minor as compared to the cost that would have to be borne by the states. In view of the court's ruling in the *North Carolina* case and cited cases that intrastate transportation is primarily the concern of the state, it is not unfair to require the one attacking the intrastate rate to prove that the rate is discriminatory. When the question of burden of proof has been raised, the courts have held that the burden of proof in attacking established railroad rates rests upon complainant. *Hoboken Manufacturers' R. Co.* v. *U. S. D. C. N. J.*, 1942, 47 F. Supp. 779, rev'd on other grounds, 64 S. Ct. 159, 320 U.S. 368, 88 L. ed. 107, rehearing denied 64 S. Ct. 516, 321 U.S. 801, 88 L. ed. 1088. *In Montana Citizens Freight Rate Association* v. *Board of Railroad Commissioners of Montana*, 1954, 271 P. 2d 1025, 128 Montana 127, the court held that Section 13 (4) contemplates that those asserting undue discrimination by rate of a carrier shall have the burden of proving such undue discrimination.

In the case at the bar if proponent had the burden of proof, it did not prove a discrimination.

V

IS A SECTION 13 (4) PROCEEDING FOR ONE CLASS OF FREIGHT RATE A REVENUE CASE

In the lower court's opinion this Court held that the Section 13 (4) proceeding was a "revenue" case. This was the reason given by the court for not requiring proof of discrimination. In this regard the lower court held as follows (147 F. Supp. 454):

> "We have carefully read and considered the three-volume transcript of the evidence and the 91 lengthy exhibits, adduced before the Commission. It may be admitted that this evidence, on the issue of reasonableness of the existing intrastate rates and upon the issue of the rail carriers' needs for the additional revenue to be produced by the increases though rather extensive, would perhaps not be sufficient to support a like order in a fully developed rate case. But, as stated, the purpose of this case is to eliminate a discrimination against interstate commerce by increasing the intrastate rates to the level of the interstate ones (found by the Interstate Commission to be reasonable, and needed by the rail carriers in Ex Parte Nos. 162, 166, 168 and 175), to the end that the interstate rates will bear their fair share of the cost of adequate rail service. This, therefore, is a revenue case, and, as said by the Supreme Court in *King* v. *United States*, 344 U.S. 254, 275:
>
> "It is not necessary, for general revenue purposes, to establish for each item in each frieght rate a fully developed rate case.
>
> "The administrative arm of the Commission would be paralyzed, if instead of adjudicating upon the rates in a large territory, on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect

the necessary increased schedule. *United States* v. *Louisiana*, 290 U.S. 70, 75-76, and see 78-79."

The court, in effect, admits that there is no evidence in the record to support a finding that the particular class of rates are not contributing a reasonable profit, however, the lower court did not believe this proof necessary in this type of proceeding even though it would be necessary in a "rate" case and cites the King case as support for its position. It is not believed that it was the intent of this Court to hold that in a Section 13 (4) proceeding the record need not reflect evidence that the particular rate is reasonable. Even if it were true that in a general proceeding before the Commission in a Section 15 proceeding it would not be necessary for the record to reflect evidence that would be necessary in a rate case, however, in a Section 13 (4) proceeding it is necessary to show that the particular class of rates sought to be increased is not contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return. *King* case (p. 270). It is submitted that a record that would support a need for general revenue purposes certainly would not necessarily be sufficient to show that a particular class of rates is not contributing its fair share of the revenue. The only way that it can be shown that a particular class of rates is not contributing "its fair proporation of respondents total income" (*King* case p. 275) is to compare the apportionable amount of income attributable to the particular rate with the apportionable amount of expenses attributable to the rate. In other words, it is submitted that the evidence necessary to support a finding that a particular rate is not contributing the profits it should to the system and thus burden on interstate commerce does not differ from the evidence that would be necessary to find that a particular rate should be raised in a rate proceeding and certainly the lower court was in error when it held

that the record was sufficient to support a finding that a particular rate is not producing a fair profit if the record reflects only a general need for revenue for the whole system. The question, simply stated, is if a system needs revenue can the Commission in a Section 13 (4) proceeding raise a particular class of freight rates even if the record does not reflect evidence necessary to compute a rate of return for that particular class of rate. It is submitted that the lower court erred in holding that Commission had the authority.

Furthermore, it should be pointed out that the evidence does not even reflect that the system is not earning a fair rate of return. Rather, the Chief Finance Officer of the Missouri Pacific, the principal railroad concerned testified that its rate of return was approximately the same as the national average (T.201).

In *Mississippi Public Service Commission* v. *United States* (1954), 124 F. Supp. 809, aff'd 349 U.S. 908, 99 L. ed. 1244, 75 S. Ct. 599, the court held:

> "The record of the evidence in the case reflects a favorable financial condition of the railroads involved herein when contrasted with that of the railroads of the country as a group."

VI

ARE THE MATTERS PRESENTED SO SUBSTANTIAL AS TO WARRANT ORAL ARGUMENT

The issues raised by this statement are of such substantial importance as to warrant further consideration of this Court.

There is conflict between the decision of the lower court and the decisions rendered by other lower courts and conflicts between the lower court and the decisions of

this Court? In *Mississippi Public Service Commission* v. *United States* (1954), 124 F. Supp. 809 (aff'd 75 S. Ct. 599, 349 U.S. 908, 99 L. ed. 1244), with facts almost identical to those in this case, the court held that the Commission's order was not supported by the evidence. Citing the same authorities as the lower court cited, in this case the Mississippi Court held that the burden was on the proponent to show that the intrastate rates were a burden on interstate commerce. The court stated:

> "There must be a finding based upon sustantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers."

In its Jurisdiction Statement filed in the Mississippi case, the Attorneys for the United States argued that there was conflict in the lower court's decision regarding Section 13 (4) matters. The statement recited:

> "Where some of the States have not done so, as here, there have often been proceedings under Section 13 (4) of the Act to remove the unjust discrimination against interstate commerce caused by the failure of intrastate traffic to bear its fair share of the transportation burden.
>
> "Such orders as have been, or may be, entered by the Commission under Section 13 (4) of the Act ought to be judged by the same standards no matter in what court they may be reviewed. To leave the

determination of such matters to the arbitrary judgment of individual courts is unfair to the Commission, the rail carriers, the shippers, and the State authorities and is a result which was obviously not intended by *Universal Camera*."

We heartily agree with Counsel for the United States that the lower courts have not used the same standard in determining whether the evidence persented supported the Commission's finding. It is further submitted that the holding of the lower court in this case was in conflict not only with the Mississippi case but with other lower courts. See *Hoboken Manufacturers' R. Co.* v. *U. S. D. C. N. J.*, 1942, 47 F. Supp. 779, reversed on other grounds, 64 S. Ct. 159, 320 U.S. 368, 88 L. ed. 107, rehearing denied 61 S. Ct. 516, 321 U.S. 801, 88 L. ed. 1088. *Montana Citizens Freight Rate Association* v. *Board of Railroad Commissioners of Montana*, 1954, 271 P. 2d 1024, 128 Montana 127.

Furthermore, it should be pointed out that if this case were affirmed, the citizens of Mississippi would enjoy lower freight rates than those prevailing in Arkansas on certain commodities because different standards were applied. As has been previously pointed out there is confliet between the lower court and the decision in the *North Carolina* case and the *King* case as to burden of proof and the effect of the finding of a Section 15 order in a Section 13 (4) proceeding.

This is an important case from a financial standpoint. The evidence introduced by the appellees in the proceedings below indicated that the amount involved in this litigation approximates one million dollars per year to the people of Arkansas. Naturally this affects the econoiny of the State of Arkansas. It also, if the increase is allowed to stand, will deter present industry from expanding and new industry from locating in Arkansas.

If this decision is reviewed it could benefit all state authorities, rail carriers, and shippers throughout the United States. If this Court will review this case and consider the questions of who has the burden of proof in the Section 13 (4) proceeding; what effect the findings of the Commission in a Section 15 hearing have on a Section 13 (4) proceeding; what evidence is necessary to support a finding of the Commission and whether a Section 13 (4) proceeding for a particular class of freight rate is a "revenue" case, it will benefit all concerned. The railroads will benefit because they will more clearly understand what evidence is necessary for to introduce to prove their case. The state authorities will be greatly benefited because they will know whether they are required to offer affirmative proof in Section 13 (4) proceedings and whether they should appear, cross examine and introduce affirmative evidence in Section 15 proceedings. The lower court and the Interstate Commerce Commission will benefit if they are advised as to sufficiency of evidence and burden of proof. At the present time Ex Parte hearings are now pending similar to the Ex Parte hearings involved in this matter. If this Court considers this case, much litigation will conceivably be prevented. Review now will probably mean more uniformity of standards of review and as stated by counsel for the United States this will benefit the Commission, the rail carriers, the shippers, and the state authorities.

CONCLUSION

It is submitted that the District Court misapprehended or misapplied the standard for determining the substantiality of evidence as approved by this Court and *Universal Camera Corporation* v. *National Labor Relations Board* (1951) 340 U.S. 474, 71 S. Ct. 456, 95 L. ed. 456. The effect of its decision raises questions of such a substantial nature and of such vital importance to the public that this honorable Court should accept the cause and this appeal for briefs on the merits and consideration on oral argument, so that proper rules of law may be announced for the clarification and guidance in cases of this nature arising in the future.

Respectfully submitted,

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Dated at
Little Rock, Arkansas
June 17, 1957

CERTIFICATE OF SERVICE

I, Harry E. McDermott, Jr., Attorney for the Arkansas Public Service Commission, hereby certify that I have on June 17, 1957, served a copy of the foregoing brief by hand or by first-class mail on all counsel of record in this cause.

HARRY E. MCDERMOTT, JR.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

ARKANSAS PUBLIC SERVICE COMMISSION, AND
REYNOLDS METALS COMPANY ..... *Plaintiffs*

v. No. 3256

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION ..... *Defendants*

John R. Thompson and Kay L. Matthews, Little Rock, Arkansas, for Plaintiff, Arkansas Public Service Commission.

Wilbur A. LaRoe, Jr., Arthur L. Winn, Jr., Samuel H. Moerman, J. Stanley Payne, and Woodson P. Houghton, of Washington, D. C., and Gustav B. Margraf, of Richmond, Virginia, and Leon B. Catlett, of Little Rock, Arkansas, for Plaintiff, Reynolds Metals Company.

Harry E. Meek, of Little Rock, Arkansas, for Intervening Plaintiff, Aluminum Company of America.

Victor R. Hansen, Assistant Attorney General, James E. Kilday and Maurice A. Fitzgerald, Attorneys, Department of Justice, Washington, D. C., and Osro Cobb, United States District Attorney, Little Rock, Arkansas, for Defendant, United States of America.

Robert W. Giannane, General Counsel, and Samuel R. Howell, Assistant General Counsel, Washington, D. C., for Defendant Interstate Commerce Commission.

R. H. Stahlheber, St. Louis, Missouri, Clyde W. Fiddes, Tyler, Texas, and Pat Mehaffy, and Toll R. Wear, Little Rock, Arkansas, for Intervening Defendant rail carriers.

Before WHITTAKER, Circuit Judge and LEMLEY and MILLER, District Judges.

WHITTAKER, Circuit Judge.

By this action plaintiffs, Arkansas Public Service Commission (hereafter called Arkansas Commission), and Reynolds Metals Company (hereafter called Reynolds), and intervening plaintiff, Aluminum Company of America (hereafter called Alcoa), ask this specially constituted three-judge Court to hold that the findings of Interstate Commerce Commission (hereafter called Interstate Commission), made on May 7, 1956, in its Docket No. 31660 (*Arkansas Intrastate Freight Rates and Charges*, 298 ICC 547), are not supported by substantial evidence, and are inadequate to support its order, entered on those findings on September 4, 1956, increasing Arkansas intrastate freight rates, on (so far as here concerned) sand and gravel, "crushed stone", asphalt rock and stone, coated, and related commodities, and cement, to the level of interstate rates on those commodities, and to enjoin enforcement of, and to set aside, that order.

While the Arkansas Commission attacks the whole order—contending that there is no substantial evidence to support the findings and that the findings, in turn, do not support the order—Reynolds and Alcoa attack the order only insofar as it strikes down, or may be interpreted as striking down, an intrastate freight commodity de-

scription and rate; promulgated by the Arkansas Commission on May 3, 1956, applying only to "Limestone, run of crusher, to be used only for fluxing purposes, in the production of alumina, minimum weight 90 per cent of the marked capacity of the car used, from Limedale Spur and Myersville Spur, Arkansas, to Bauxite Junction, Arkansas, minimum weight 1500 net tons to be shipped on one day from one consignor to one consignee" (hereafter called the Arkansas fluxing stone rate order of May 3, 1956), contending that the order, though indefinite, is subject to that interpretation, and, if so construed—as the defendants, and the intervening rail carriers, do construe it—is void, because that issue was not considered by the Interstate Commission, but was found by it to be "beyond the scope" of the case, and, hence, the order, so construed, is not supported either by any evidence or findings and is wholly arbitrary. This is the dominant issue in the case.

The defendants, the United States and Interstate Commission, and the intervening rail carriers doing busines in Arkansas*, defend the order in all things—even the interpretation that it would strike down the Arkansas fluxing stone rate order of May 3, 1956, because, they argue, "fluxing stone" is but another "label" for, and is the same commodity as, "crushed stone", and, regardless of its use, it is subject to the published Arkansas intrastate rates, applicable generally to "crushed stone", which were increased by the challenged order of the Interstate Commission.

At the close of World War II the interstate, and the Arkansas intrastate, freight rates on the commodities involved were the same. To meet greatly increased needs

*Thirteen in all, but the dominant ones are Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, St. Louis-Southwestern Railway Company and Chicago, Rock Island & Pacific Railroad Company.

of the nation's rail carriers for additional revenues after the close of that War, the Interstate Commission, upon petition of the carriers, held extensive hearings, participated in by representatives of the various state commissions, and, on December 5, 1946, in Ex Parte No. 162 (*Increased Railway Rates, Fares and Charges*, 1946, 266 ICC 537), it found that the needs of those carriers required a substantial increase in freight rates, applicable to both interstate and intrastate commerce, and it ordered a 20% increase in basic interstate rates in western territory, including Arkansas, in contemplation that the several states in that territory (including Arkansas) would make the same rates effective upon intrastate commerce. That increase is not here involved, because the Arkansas Commission, upon petition of the rail carriers, made it effective on all commodities in that state. But, to meet the further needs of those carriers, the Interstate Commission, subsequently, and after similar extensive hearings, ordered horizontal increases in all basic interstate rates in western territory, including Arkansas, of 20% (in Ex Parte No. 166—*Increased Freight Rates*, 1947, 269 ICC 33, 270 ICC 81, 270 ICC 93, 270 ICC 493), and of 8%, except on cement, (in Ex Parte No. 168—*Increased Freight Rates*, 1948, 272 ICC 695, 276 ICC 9), and of 12%, again except on cement, (in Ex Parte No. 175—*Increased Freight Rates*, 1951, 280 ICC 179, 281 ICC 557, 248 ICC 589, 289 ICC 395, 292 ICC 23, 297 ICC 17).

Though the rail carriers petitioned the Arkansas Commission to make the Ex Parte 166, 168 and 175 increases effective upon intrastate commerce in Arkansas (as the Interstate Commission contemplated would be done), it refused to grant any part of the X-166 and X-168 increases upon sand and gravel, "crushed stone" and related commodities, but it did grant one-half of the X-175 increase, or 6%, on those commodities, and, likewise, it

granted only one-half of the X-166 increase, or 10%, on cement. The result was that the Arkansas intrastate rate was about 36% less than the interstate rate on sand and gravel, "crushed stone" and related commodities, and was 10% less than the interstate rate on cement.

On October 11, the Class I rail carriers operating in Arkansas filed a petition with the Interstate Commission, alleging that the refusal of the Arkansas Commission to authorize the full amounts of the X-166, X-168 and X-175 increases on the stated commodities had resulted (1) in preferences and prejudice as between persons and localities in intrastate commerce in Arkansas, on the one hand, and persons and localities in interstate commerce, on the other land, and (2) in discrimination against interstate commerce, as such, all in violation of Section 13(4) of the Interstate Commerce Act [49 USC, Sec. 13 (4)], and that, in consequence, they were being deprived of large amounts of revenue urgently needed to provide efficient transportation service as contemplated by Section 15a (2) of the Act. 49 USC, Section 15a (2). Pursuant to that petition, (which ICC docketed as its No. 31660), and to Section 13 (3) of the Act [49 USC, Section 13 (3)], on November 16, 1954, the Interstate Commission issued an order directing an investigation into Arkansas intrastate freight rates and charges with respect to the commodities here involved. The Arkansas Commission, Reynolds, Alcoa, and other shipping interests, intervened in opposition to the petition.

Both Reynolds and Alcoa had, several years earlier, established large plants near Bauxite Junction, Arkansas (a point on the Missouri Pacific, about 25 miles south of Little Rock) for the manufacture of alumina, from which aluminum metal is made, and, in their manufacturing process, required huge amounts (in excess of 730,000 tons annually—or a 20-car trainload each day) of calcium for

"fluxing" purposes. To supply that need they severally acquired large limestone deposits (of about 95% calcium carbonate and suitable to their needs), and established appropriate plants, at Myersville Spur and Limedale Spur (points about 2 miles apart in northwest Arkansas, also on the Missouri Pacific, and 153 and 136 miles, respectively, from Bauxite Junction).

No order of the Arkansas Commission required the rail carriers to publish, and the Missouri Pacific had not voluntarily published, any commodity description and rate in terms applying specifically to crushed stone for industrial or "fluxing" uses, and the Reynolds and Alcoa shipments of stone referred to moved under the Missouri Pacific's Arkansas intrastate rate applicable to "crushed stone" which was $1.37, per ton, from Myersville Spur and $1.28, per ton, from Limedale Spur to Bauxite Junction, which, if raised by 36% to the level of the interstate rates, as sought by the rail carriers, would become $1.87, per ton, from Myersville Spur, and $1.77, per ton, from Limedale Spur, to Bauxite Junction.

At intervals, over a long period of years, Reynolds had contended with Missouri Pacific that existing Arkansas intrastate rates on this commodity were abnormally high, in comparison with both interstate and intrastate rates voluntary established in adjoining states by Missouri Pacific, and other railroads, covering crushed stone for industrial or "fluxing" uses, and it had implored Missouri Pacific to voluntarily publish in Arkansas a commodity description and rates, applicable specifically to crushed stone for industrial or "fluxing" uses. But, in the fall of 1954, Missouri Pacific finally declined, and, instead, instituted this proceeding to increase the Arkansas intrastate rates on "crushed stone" to the level of interstate rates or by 36%.

So, on March 2, 1955—and thus subsequent to the rail carriers' petition to the Interstate Commission of October 11, 1954, and to the latter's order of November 16, 1954, directing the 13th Section investigation referred to, but before it had been heard—Reynolds instituted a complaint proceeding, before the Arkansas Commission, against Missouri Pacific, alleging that the rates and charges exacted and collected by it for the transportation of crushed limestone, to be used only for fluxing purposes in the production of alumina, from Myersville Spur and Limedale Spur, Arkansas, to Bauxite Junction, Arkansas, are unduly discriminatory against Reynolds, and unduly favor shippers in Texas and other nearby states, and asking the Arkansas Commission to hear the issues and to establish a commodity description, and reasonable rate, applicable to the movement of crushed stone to be used only for "fluxing" purposes in the production of alumina, from Myersville and Limedale Spurs, Arkansas, to Bauxite Junction, Arkansas.

Thereafter, the Interstate Commission assigned the 13th Section investigation proceeding, pending before it, for formal hearing before a Commission Examiner, at Little Rock, and the matter was so heard at the place on March 21, 22 and 23, 1955. A large mass of evidence oral and documentary, was introduced by the rail carriers, and some supporting intervenors (tending, generally, to show that the Arkansas intrastate rates, on the commodities here involved, as described in existing tariffs, were substantially lower than interstate rates—previously found reasonable, and established, by the Interstate Commission in X-166, X-168 and X-175—and failed to produce a fair share of the revenues required by the rail carriers to provide adequate service; and, thus, caused undue preference to intrastate shippers and undue prejudice against interstate shippers, and caused undue discrimination against interstate commerce, as such; that increasing

those intrastate rates to the interstate level would not result in unreasonable rates, and would produce about $1,000,000 annually of additional revenue needed by the rail carriers to enable them to furnish adequate rail service), and by the Arkansas Commission and other shipping interests (tending, generally, to show the contrary, but particularly that the increase sought would place Arkansas intrastate rates above reasonable levels, and would also, as a consequence, divert a substantial amount of traffic to trucks, and, hence, the increases would fail to produce additional revenue to the rail carriers).

But, at that hearing, Reynolds and Alcoa offered evidence only in support of their contention that their "fluxing" stone (which, though of high calcium content, is of lower grade than, and has only half the value of, crushed stone, used as an aggregate in the making of concrete, and is shipped as it comes from the crusher, ranging from dust to 10-inch rocks) was a *sui generis* commodity and essentially different than "crushed stone" (which, as used in both the interstate and intrastate tariffs, was thought, generally, to mean stone that has been washed and screened to sizes of from ½ inch to 2 inches, for use in the making of concrete), and they pointed to the regularity, capacity carloading and trainload quantities of their shipments, moving daily, over one line, from two neighboring origins to one destination, as transportation economies involved in their shipments that are not involved in the shipment of "crushed stone", generally, and they contended, on these bases that the existing "crushed stone" rates were unreasonably high, and that they were entitled to a separate commodity description and to a lower rate than the rate then applicable to "crushed stone" in Arkansas, as, they contended, Missouri Pacific had voluntarily made effective (intrastate) on in-

dustrial limestone or fluxing stone, in the neighboring state of Texas*, and (interstate—through Arkansas), on like commodities from Prairie du Rocher, Illinois, to Baton Rouge, Louisiana**, and they, specifically, called attention to the fact that a complaint proceeding, seeking a commodity description and lower rate for the shipment of their fluxing stone from Myersville and Limedale Spurs to Bauxite Junction, had been instituted, and was then pending awaiting trial, before the Arkansas Commission, and they orally prayed the Interstate Commission to stay this proceeding until the Arkansas Commission could resolve the issues in that complaint case, but, if such stay be refused, that the Interstate Commission find that the proposed increases are neither just nor reasonable, as applied to their fluxing stone shipments.

All this evidence was received subject to objections of counsel for the rail carriers, variously phrased, including (R.174) "I am sure that an inquiry of that nature would be utterly foreign to the purpose of a 13th Section proceeding", and (R.474) "I want it understood that our position is that the adjustment in the basic rate is not a proper function of a 13th Section proceeding", and, as stated by a principal witness for the rail carriers (R. 482), "Mr. Examiner, it is not my understanding that the basis rates on limestone are directly involved in this discrimination case, because prior to the Ex Parte 162 increases the state and interstate rates on this particular limestone traffic were the same, and I am presenting

*It appears that Missouri Pacific had established in Texas a commodity description and lower rate (than applicable to "crushed stone", generally) for industrial limestone or fluxing stone between the quarry points of Littlinger, McNeil, New Brainfels and Ogden, Texas, to steel mills and similar industries at Houston, Lone Star, Corpus Christi, Waco and Evadale, Texas.

**Limestone from Prairie du Rocher, Ill., to Baton Rouge, 276 ICC 381 (1949).

these rebuttal exhibits merely because the protestants have dealt with the level of these basic rates in their presentation."

At the conclusion of the hearing, the Examiner announced that a proposed report would be prepared and released in due season.

On September 7, 1955—and before the ICC's examiner's proposed report was prepared and filed (on October 18, 1955)—the complaint proceeding instituted by Reynolds against Missouri Pacific came on for trial before, and was fully heard by, the Arkansas Commission, and was taken under submission for decision.

On October 18, 1955, the Interstate Commission's examiner filed his proposed report, generally supporting the position of the rail carriers and saying, among other things, with respect to the contentions of Reynolds and Alcoa, the following:

> "The record shows that no separate classification exists in Arkansas intrastate tariffs for fluxing limestone. It carries the same rate as crushed stone. This is a proceeding under Section 13 (4) of the Act and one of the issues concerns whether the Arkansas intrastate rate on crushed stone should be increased, as proposed, to correspond with the interstate rates. *Protestants' position amounts to a counter-proposal which is not in issue in this proceeding.*" (Emphasis supplied.)

And the examiner further stated:

> "It is further contended that the reasonableness of Arkansas intrastate rates on fluxing stone is under consideration by the Arkansas Commission and any action under Section 13 of the Act should be deferred until the state Commission establishes reasonable and lawful rates."

Reynolds, Alcoa, the Arkansas Commission, and others

timely filed exceptions to the examiner's proposed report.

On May 3, 1955, the Arkansas Commission filed its report and order in the complaint proceeding before it, in which, after making elaborate findings, it ordered:

> "That the Missouri Pacific Railroad make effective for intrastate traffic in Arkansas a rate of $1.16 per ton of 2,000 pounds, including all Ex Parte increases authorized to the date of this order, to apply on "Limestone, run of crusher, to be used only for fluxing purposes, in the production of alumina, minimum weight 90 percent of the marked capacity of the car used from Limedale Spur and Myersville Spur, Arkansas, to Bauxite Junction, Arkansas, minimum weight 1,500 net tons, to be shipped on one day from one consignor to one consignee."

Four days later, on May 7, 1956, ICC filed its report (298 ICC 547), overruling the exceptions mentioned, in which it elaborately discussed the issues and the evidence and made numerous subsidiary findings, including the following:

> "The Aluminum Company of Amercia and the Reynolds Metals Company use large volumes of crushed stone as a fluxing agent in refining crude ore in the production of aluminum at Bauxite Junction, Arkansas. Such stone is produced at Myersville Spur and Limedale Spur. Their position is that crushed stone, when moving for fluxing purposes, should have a lower base rate than crushed stone when moving for highway construction. They state that fluxing limestone is a physically different form of limestone than crushed stone used as a road aggregate, and that it is a lower grade, lower priced, heavier loading commodity, and moves in much larger and more regular volume than the road-aggregate stone. The Aluminum Company of America urges that a reasonable rate on fluxing stone from Myersville Supr to Bauxite Junction would

be $1.3216 per ton, which is on the level of the Texas rates on fluxing and other industrial stone, and includes all authorized increases. That rate is compared with the present rate of $1.37 and the proposed rate of $1.87 on crushed stone.

"No separate classification for fluxing stone is provided in the respondents' Arkansas intrastate tariffs, nor in their interstate tariffs publishing rates to and from Arkansas. The same rates apply as on crushed stone. *Whether or not a separate classification should be provided on this commodity within Arkansas presents an issue which we understand is now pending in a complaint proceeding before the Arkansas Commission, and which is beyond the scope of this proceeding*". (Emphasis supplied);

ICC then made its ultimate findings, finding, in essence, (1) that intrastate freight transportation conditions in Arkansas are not more favorable than those incident to interstate transportation between Arkansas and other states; (2) that the rate increases authorized in Ex Parte Nos. 166, 168 and 175, and here sought to be applied to Arkansas intrastate rates, are just and reasonable; (3) that the Arkansas intrastate rates on the commodities here concerned are lower than the interstate rates, and that traffic moving thereunder fails to produce its fair share of the revenues required to enable the rail carriers to provide adequate and efficient rail transportation service, and unduly discriminate against interstate commerce; (4) that, with respect to sand and gravel, there is active competition between persons and localities, in interstate commerce, between points in Arkansas and points in other states, on the one hand; and persons and localities engaged in intrastate commerce in Arkansas, on the other, and that existing disparities between current intrastate and interstate rates on sand and gravel cause undue preference to intrastate shippers and localities, and undue

prejudice to interstate shippers and localities; (5) that the undue preferences and prejudices respecting persons and localities, and the unjust discrimination against interstate commerce, should be removed by applying to the Arkansas intrastate rates, on the commodities here embraced, the same increases as were authorized in Ex Parte Nos. 166, 168 and 175; (6) that such increases will not result in unreasonable rates but will increase the rail carriers' revenues by approximately $1,000,000 annually, and (7) that such increased revenues are required from intrastate traffic in Arkansas to enable the rail carriers to furnish adequate and efficient railway transportation service, and the report concluded that, unless the Interstate Commission be notified by the Arkansas Commission, within 30 days, that it will permit these increases to be made effective, an order accordingly would be entered.

Thereafter, on June 18, 1956, the Missouri Pacific filed with the Interstate Commission a "petition for Interpretation" of its report of May 7, 1956. It referred to the Arkansas Commission's order of May 3, 1956, and said that the Interstate Commission's report had left in doubt whether the increases it had found necessary on "crushed stone" were—in respect of the limestone shipments of Reynolds and Alcoa from Myersville and Limedale Spurs to Bauxite Junction for fluxing purposes—to be applied to the existing published rates on "crushed stone" of $1.37 from Myersville Spur, and $1.28 from Limedale Spur, to Bauxite Junction, or to the new commodity description and $1.16 rate prescribed by the Arkansas Commission's order of May 3, 1956, applicable to limestone, run of crusher, moving between said points, to be used only for fluxing purposes, and it asked the Interstate Commission to issue a supplemental report or order leaving no doubt that the increases were to be

added to "the rates existing at the time of the hearing" (March 21, 22 and 23, 1955) on "crushed stone" from Myersville Spur and Limedale Spur to Bauxite Junction.

On June 29, 1956, Reynolds filed a reply to Missouri Pacific's Petition for Interpretation, and a motion for reopening and reconsideration with respect to fluxing limestone from Myersville and Limedale Spurs to Bauxite Junction, in the light of the Arkansas Commission's order of May 3, 1956.

On July 2, 1956, Aloca filed a reply to Missouri Pacific's Petition for Interpretation, contending that, by means of that petition, Missouri Pacific was proposing by "interpretation" to settle an issue which the Commission had not considered but had found to be "beyond the scope of this proceeding."

On July 11, 1956, the Arkansas Commission filed a petition for reopening and reconsideration.

On September 4, 1956, the Interstate Commission entered its order denying the motions of Reynolds and the Arkansas Commission for reopening and further consideration, but sustaining the petition of Missouri Pacific for interpretation of its reports, and saying:

> "Upon consideration of the record, the petition and the replies thereto, we find no distinction was made by the respondent railroads in their intrastate rates in Arkansas on crushed stone based on use for fluxing, or other purposes, *and the matter of establishing a separate classification for limestone for fluxing purposes was* NOT IN ISSUE UNDER THE ORDER INSTITUTING THIS INVESTIGATION, *and that the evidence of record does not support a finding that such a distinction should be made* UNDER THE ISSUES BEFORE THIS COMMISSION IN THIS PROCEEDING insofar as the application of the authorized Ex Parte *general* freight rate increases referred to in

the record are concerned" (emphasis supplied), and it thereupon ordered:

> "That the respondent railroads, in complying with this order, shall add the said increases to *all existing* intrastate rates on crushed stone in Arkansas *regardless of use or special designation as to the use of that commodity.*"

and it further ordered that the rail carriers make the increases effective October 25, 1956.

On October 9, 1956, the Arkansas Commission and Reynolds brought this suit against the United States and the Interstate Commission to enjoin, and to set aside, said order, and, as stated, Alcoa has intervened as a plaintiff, and the rail carriers have intervened as defendants, and all parties were fully heard by us upon the record as made before the Commission, and upon briefs and in oral argument, at Little Rock, Arkansas, on November 26, 1956.

The foregoing are, and we find them to be, the facts.

We now turn to the issues raised by the parties, under those facts, and to the law.

We deal first with the issues raised by the Arkansas Commission. Its first contention is that the Interstate Commission's findings, No. 4 — that existing intrastate rates on sand and gravel cause undue preference to intrastate shippers and localities, and undue prejudice to interstate ones—is neither supported by substantial evidence nor adequate to justify the Commission's statewide order increasing local rates to the level of the interstate ones on those commodities.

In view of the fact that the object of this action was to increase Arkansas rates, not in certain localities but *statewide*, to the level found reasonable, and neces-

sary to the revenue needs of the rail carriers, by the Interstate Commission in Ex Parte Nos. 166, 168 and 175—neecssarily upon the ground that then existing Arkansas rates unduly discriminate against interstate commerce, as such—we think that this point is really immaterial to the case, but it is presented and we deal with it briefly.

The record shows that interstate shippers of sand and gravel located at Doniphan and Iron Mountain, Missouri, and at Fort Gibson, Oklahoma, all near the north and northwest Arkansas borders, compete with Arkansas shippers of those commodities in local areas in the northeast, north central and northwest parts of Arkansas, and that those interstate shippers are prejudiced to the preference of the intrastate ones on sand and gravel in those local areas in Arkansas, to the extent of the difference in the interstate rate over the intrastate one. But there is no evidence that such competition exists beyond those local areas in Arkansas or that it is state-wide, nor does the Interstate Commission otherwise find, yet its order, to the extent based on this finding, extends throughout the state of Arkansas.

The Supreme Court has held, in *North Carolina* v. *United States*, 325 U.S. 507, 512-514, that such a finding "is an inadequate support for nullifying state-wide rates on the grounds that they constitute unjust discrimination against interstate" traffic. This Supreme Court has likewise so held in *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563, 579, 580, and in *Florida* v. *United States*, 282 U.S. 194, 208. We, therefore, must and do hold that this finding does not constitute an adequate basis to support a state-wide "general sweeping order against all intrastate * * * rates" (North Carolina case, p. 513) on sand and gravel in Arkansas.

The next contention of the Arkansas Commission is that the Commission's other findings (that the increases authorized, on the commodities involved, are just and reasonable, and that the Arkansas intrastate rates fail to produce a fair share of the revenues required to enable the rail carriers to provide adequate service, and cause an undue discrimination against interstate commerce which should be eliminated by increasing the Arkansas intrastate rates to the level of the interstate ones, and that such increases will not result in unreasonable rates and will produce additional revenues of about $1,000,000 annually, which is required to enable the rail carriers to furnish adequate service) are not supported by substantial evidence and are themselves inadequate to support the Commission's order.

We have carefully read and considered the three-volume transcript of the evidence and the 91 lengthy exhibits, adduced before the Commission. It may be admitted that this evidence, on the issue of reasonableness of the existing intrastate rates and upon the issue of the rail carriers' needs for the additional revenue to be produced by the increases though rather extensive, would perhaps not be sufficient to support a like order in a fully developed rate case. But, as stated, the purpose of this case is to eliminate a discrimination against interstate commerce by increasing the intrastate rates to the level of the interstate ones (found by the Interstate Commission to be reasonable, and needed by the rail carriers, in Ex Parte Nos. 162, 166, 168 and 175), to the end that the interstate rates will bear their fair share of the cost of adequate rail service. This, therefore, is a revenue case, and, as said by the Supreme Court in *King* v. *United States*, 344 U.S. 254, 275:

> "It is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case.

> "'The administrative arm of the Commission (would be) paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule.' *United States* v. *Louisiana*, 290 U.S. 70, 75-76, and see 78-79."

Here the Commission has applied to the Arkansas intrastate rates the same conclusions it reached, Ex Parte Nos. 166, 168 and 175, as to the need of the rail carriers for increased revenue on a national basis and has distributed the burden within Arkansas on the same lines it followed when estimating the revenues available in the southwestern territory from intrastate as well as interstate operations, as was done in Florida and approved by the Supreme Court in the *King* case, p. 272; and here, as in that case, "The evidence which forms the basis of the Commission's nation-wide order becomes the natural basis for its (Arkansas) order", *King* case, p. 272.

As was said, under like circumstances, in *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 483-484:

> "The decision in the first proceeding, that the increase in the interstate rate was reasonable, was made in the hope that the state Commissions would bring intrastate rates into harmony. When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be raised in order that the intrastate traffic may bear its fair share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to

be intimately bound together, there is no occasion to deal with the reasonableness of the interstate rate more specifically, or to separate intrastate and interstate costs and revenues. *Cf. American Express Co.* v. *Caldwell*, 244 U.S. 617; *United States* v. *Louisiana*, *supra*, (290 U.S. 70); *Florida* v. *United States*, ante (292 U.S. 1)".

In the light of these decisions, we are fully convinced that the evidence adequately supports the Commission's findings as to the need for, and the reasonableness of, the ordered increases in Arkansas intrastate rates as they existed at the time of the hearing before the Commission in March, 1955.

The Arkansas Commission also contends that the increases will cause a large amount of present rail traffic to be diverted to trucks and that, as a result, the increases will not produce additional revenue to the rail carriers, and that the Interstate Commission's finding to the contrary is not supported by substantial evidence. There was much—we think quite substantial—evidence, both ways, on this issue, and it was, thus, one of fact, for resolution by the Interstate Commission, and its finding thereon must be held to be supported by substantial evidence.

As to the contention of the Arkansas Commission that the Interstate Commission's findings do not adequately support its order of September 4, 1956, we have compared those findings with the ones found adequate, in a like situation, by the Supreme Court in the *King* case, and, on the strength of that case, we must and do hold that the Interstate Commission's findings here adequately support its order, as respects Arkansas intrastate rates on the commodities here involved as those commodities and rates were described and set forth in the published tariffs effective at the time of the hearing before the Interstate

Commission in March, 1955 (so stated to make certain that we do not here mean, inferentially, to approve so much of the Interstate Commission's order as would, or as might, strike down the Arkansas Commission's fluxing stone rate order of May 3, 1956).

This brings us to the issue presented by Reynolds and Alcoa, which is the principal and most troublesome question in the case. They contend that, though the rail carriers took the position at the hearing before the Interstate Commission that the matter of a new Arkansas commodity description or classification and a lower rate for their fluxing stone was "utterly foreign to", and "not a proper function of" a 13th Section proceeding, and though the Interstate Commission's examiner did not consider their contentions but said that their "position amounts to a counter-proposal which is not in issue in this proceeding", and though the Interstate Commission itself did not consider their contention, but said in its report "Whether or not a separate classification should be provided on this commodity within Arkansas presents an issue which we understand is now pending in a complaint proceeding before the Arkansas Commission, and which is beyond the scope of this proceeding", yet the Interstate Commission's order of September 4, 1956, here attacked, though itself saying that "The matter of establishing a separate classification for limestone for fluxing purposes was not in issue under the order instituting this investigation", nevertheless strikes down the Arkansas Commission's fluxing stone rate order of May 3, 1956, by ordering the rail carriers "to add the increases "to all *existing* intrastate rates" (which would include the Arkansas fluxing stone rate order *of May* 3, 1956) "on crushed stone in Arkansas *regardless of use or special designation as to the use of that commodity*" (emphasis supplied), all without process, consideration, evidence or findings, and

that, therefore, the Commission's order, insofar as it affects, or may affect, the Arkansas fluxing stone rate of May 3, 1956, is wholly void and should be enjoined and set aside.

The defendants, including the Interstate Commission itself, seek to defend the Interstate Commission's order —even that construction of it which would strike down the Arkansas Commission's fluxing stone rate order of May 3, 1956—upon the ground that crushed limestone, though to be used only for industrial or fluxing purposes, is just "crushed stone", and is subject to the increased rates applying to crushed stone; and that it was not "proper" for the Arkansas Commission to entertain a proceeding to establish, or to order established, a new commodity description and rate for "limestone, run of crusher, to be used for fluxing purposes in the production of alumina", while a 13th Section proceeding, involving intrastate rates on "crushed stone", was pending.

It cannot be doubted that original and primary jurisdiction and power to fix intrastate rates in Arkansas is vested in the Arkansas Commission, *North Carolina* v. *United States*, 325 U.S. 507, 510-511; *Illinois Commerce Commission* v. *Thomson*, 318 U.S. 675, 684-685; *Florida* v. *United States*, 282 U.S. 194, 211-212; *Arkansas Commission* v. *Chicago, R. I. & P. R. Co.*, 274 U.S. 597, 603; *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U.S. 493, 510; *American Express Co.* v. *South Dakota*, 244 U.S. 617, 625, and that no such jurisdiction or power is granted to or vested in, the national government or its Interstate Commerce Commission, *ibid.*

As said by Justice Black in the *North Carolina* case, p. 511, "Neither Section 13(4) (of the Interstate Commerce Act) nor any other Congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intrastate rates."

Since the enactment of Section 13 (4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate", and even then, as Justice Black further said in that case, p. 511, "* * * The Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission", and it has been often and clearly held that Interstate Commerce Commission justification for the "exercise of the Federal power must clearly appear", *Florida* v. *United States*, *supra*, and an intention of that Commission to interfere with the state's rate-making function is not to be presumed, *Arkansas Commission* v. *C. R. I. & P.*, *supra*, and may not be left in serious doubt, *Illinois Commerce Commission* v. *Thomson*, *supra*, but must clearly appear and meet "a high standard of certainty", *Illinois Central R. Co.* v. *Public Utilities Commission*, *supra*.

Was the Arkansas Commission acting within its exclusive original and primary jurisdiction and power to prescribe intrastate rates in Arkansas when it promulgated the Arkansas fluxing stone order of May 3, 1956?

There can be no doubt—and, in fact, it is conceded—that if the Arkansas Commission had promulgated that commodity description and rate before the institution of this 13th Section investigation, its fluxing stone rate order of May 3, 1956, could not be stricken down by the Interstate Commission except by a frontal attack, in a proceeding brought for the purpose, or properly expanded to embrace it, and upon clear findings supported by substantial evidence.

Hence, the determinative question is: Did the earlier institution of this 13th Section investigation proceeding deprive the Arkansas Commission of Jurisdiction and power to prescribe its fluxing stone rate order of May 3, 1956? If it did not, then that order was not *void* and cannot be stricken down by the Interstate Commission without consideration and indirectly, by inference or ambiguous language, but only in a frontal attack, in a 13th Section proceeding brought for the purpose, or properly expanded to embrace it, and under procedural due process, and upon clear findings, supported by substantial evidence, and by an order, meeting a high degree of certainty and leaving no serious doubt of its meaning.

Defendants attack the jurisdiction of the Arkansas Commission to make, in these circumstances, its fluxing stone rate order of May 3, 1956, but admit that there is no decision holding that the prior institution of a 13th Section investigation proceeding deprives a state commission of its original and primary jurisdiction to prescribe an interstate commodity description and rate, though they argue that such ought to be the law, in the circumstances here, and that we should so declare.

We have carefully considered the point, but, in view of the numerous clear and specific holdings by the Supreme Court, above cited, that exclusive original and primary jurisdiction to prescribe intrastate rates is vested in the respective state commissions, and not in the Interstate Commerce Commission, and in view of the fact that no act of Congress or decision of the Supreme Court has stated or indicated—if, indeed, either might validly do so—any limitation upon that exclusive original and primary jurisdiction, or any condition under which the states may be deprived of it, we must hold that the earlier institution of this 13th Section proceeding to increase then existing intra-state rates in Arkansas—and in which pro-

ceeding the Interstate Commission found the matter of a new Arkansas commodity description and rate for fluxing stone, and also the Arkansas Commission's order thereon of May 3, 1956, to be "beyond the scope" of its investigation—did not deprive the Arkansas Commission of its exclusive, original and primary jurisdiction to prescribe its Arkansas fluxing stone rate order of May 3, 1956, in the first instance.

Defendants argue that it is not "proper" for the Arkansas Commission to so act in such circumstances, and that to permit it to do so will substantially impair administration by the Interstate Commission of the 13th Section of the Interstate Commerce Act. We believe that this is not so—for, as indicated, it is always open to the Interstate Commission, under the 13th Section of the Interstate Commerce Act, to remove an undue discrimination against interstate commerce in a proper proceeding—but whether so or not, it is not our function to say what is "proper" conduct of the Arkansas Commission in the circumstances, but, rather, our concern is whether, in the promulgation of its fluxing stone rate order of May 3, 1956, it acted within its exclusive original and primary jurisdiction and power to prescribe an intrastate classification or commodity description and rate order, as we think it did.

We bear in mind that here there was no attempt covertly to circumvent or evade 13th Section jurisdiction and power of the Interstate Commission over intrastate rates, discriminatory against interstate commerce. Both the Interstate Commission's examiner and the Commission itself were formally advised of the complaint proceeding then pending before the Arkansas Commission (seeking a new commodity description and lower rate in Arkansas for fluxing stone as a *sui generis* commodity), and both were asked by Reynolds to stay the interstate pro-

ceeding until the Arkansas Commission could act. Both refused the stay and said that matter was "beyond the scope of this proceeding". Even after the Arkansas Commission had acted, Reynolds and the Arkansas Commission petitioned the Interstate Commission to reopen its proceeding to consider the new Arkansas fluxing stone rate order of May 3, 1956 (thus offering to expand the Interstate Commission's proceeding to include that order), but it denied that petition and again said, in its order of September 4, 1956, that that matter "was not in issue under the order instituting this investigation", yet, in that very order, it uses language that would strike down the Arkansas Commission's fluxing stone rate order of May 3, 1956, and, in this Court, where its order is under attack for that reason, it stands its ground and prays that its determination be confirmed. This shocks the conscience.

Here, admittedly, the Interstate Commission did not consider the Arkansas Commission's fluxing stone rate order of May 3, 1956, and admittedly there was no finding by it to support that interpretation and effect of its order of September 4, 1956, which would nullify the Arkansas Commission's fluxing stone rate order of May 3, 1956, and it is obvious that the Interstate Commission's order of September 4, 1956, though subject to that interpretation, does not, in this respect, meet the high standard of clarity and certainty which the law requires.

The Missouri Pacific is presently moving Reynolds' and Alcoa's fluxing stone from Myersville and Limedale Spurs to Bauxite Junction under the Arkansas Commission's fluxing stone rate order of May 3, 1956, but avowedly it will—under its interpretation, and the interpretation of the Interstate Commission, of the Interstate Commission's order of September 4, 1956—unless enjoined by us in this proceeding, entirely ignore, and thus completely nullify the effect of, the Arkansas Commission's fluxing stone

rate order of May 3, 1956, all without consideration, evidence or findings.

Our conclusion is, and we hereby hold, that the order of the Interstate Commission of September 4, 1956, here under attack, is valid and enforceable, except to the extent that it does, or may, affect the Arkansas Commission's fluxing stone rate order of May 3, 1956, and in that respect and to that extent it is invalid and should be enjoined, and, accordingly, we enter the following decree.

DECREE

This specially constituted statutory three-judge Court having heard the evidence, and having heard the arguments and considered the briefs of counsel, and being fully advised in the premises, finds the facts to be, and concludes the law to be, as set forth (above) in its opinion herein of this date, and, based thereon, it is ordered, adjudged, and decreed by the Court that the order of the Interstate Commerce Commission of September 4, 1956, in its Docket No. 31660, entitled "In the Matter of Increased Freight Rates and Charges in the State of Arkansas", is valid and may be enforced, except to the extent that it does, or may, in any way, affect the Arkansas intrastate rate order made by the Arkansas Public Service Commission on May 3, 1956, in its Docket No. R-976 entitled "*Reynolds Metals Company* v. *Bauxite & Northern Railway Co.* and *Missouri Pacific Railroad Co.*", but in that respect and to that extent said order of the Interstate Commerce Commission of September 4, 1956, is invalid and its enforcement should be, and is hereby, permanently enjoined.

Done, this 28 day of December, 1956.

s CHARLES E. WHITTAKER
Circuit Judge

s JOHN E. MILLER
District Judge

s HARRY J. LEMLEY
District Judge

SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 197

ARKANSAS PUBLIC SERVICE COMMISSION

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal from the United States District Court for the Eastern District of Arkansas.

MOTION TO AFFIRM.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 1095.

ARKANSAS PUBLIC SERVICE COMMISSION

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal from the United States District Court for the Eastern District of Arkansas.

MOTION TO AFFIRM.

Come now the Arkansas rail carriers, intervening defendants and appellees in the above-entitled case, and, pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of the Supreme Court of the United States, move to affirm the judgment and decree of the District Court on the grounds that the question presented is so unsubstantial as not to need further argument.

In support thereof they respectfully direct attention to the following:

STATEMENT OF THE CASE.

This is a direct appeal from the final judgment of a specially constituted three-judge District Court, which, insofar as here pertinent, found valid and enforceable an Order of the Interstate Commerce Commission requiring certain increases in specified Arkansas freight rates. The rates in question are those applying generally to such commodities as sand and gravel, crushed stone, agricultural limestone, asphalt rock, stone, etc., coated, and silica sand in boxcars. As to each of the intrastate rates in issue, the Arkansas Public Service Commission had previously failed to accord increases comparable to those granted by the Interstate Commerce Commission for application to like interstate traffic.

The involved Interstate Commerce Commission proceeding is its Docket 31660—**Arkansas Intrastate Freight Rates and Charges**, 298 ICC 547. This is a proceeding under Section 13 (3) and (4) of the Interstate Commerce Act, pursuant to which intrastate rates, if found to result in undue prejudice to interstate shippers or to unlawfully discriminate against interstate commerce generally, may be ordered increased as found necessary to remove such unlawfulness. Various cases of similar type have previously received the attention of this Court. The Commission's Order assailed before the statutory District Court is that of September 4, 1956. This Order was issued as the culmination of an Interstate Commerce Commission investigation instituted by the Commission's Order of November 16, 1954. The Commission handling included a three-day hearing before a hearing Examiner, at which time a record represented by over 500 transcript pages and over 90 exhibits was made; the Examiner's Proposed Report recommending all of the increases as sought; the filing of Exceptions by protesting parties; a Reply thereto by the rail carriers; oral argument before the Interstate Commerce

Commission; the Commission's Report of May 7, 1956, and the aforementioned Order of September 4, 1956.

Such Commission proceedings were followed by the District Court action wherein parties in opposition sought to enjoin and set aside the Commission's Order of September 4, 1956. In a decision attached as an Appendix to appellant's Jurisdictional Statement, the three-judge Court unanimously found, insofar as here pertinent, that the Interstate Commerce Commission's Order was valid and adequately supported by proper findings, which, in turn, found adequate support in substantial evidence of record.

The decision of the lower Court upholding the Report and Order of the Interstate Commerce Commission is now presented to this Court on the premise that a substantial question remains for determination.

NO SUBSTANTIAL QUESTION IS, IN FACT, PRESENTED.

The entire subject matter of the instant proceeding has already received the most painstaking and detailed attention. The questions now presented by appellant are noticeably without substance. To the extent that any valid question is raised, it is clearly with regard to matters already authoritatively and properly determined by this Court. We shall briefly consider the contentions of appellant.

The keystone of appellant's position is the **Universal Camera** case, **Universal Camera Corp. vs. National Labor Relations Board** (1950), 340 U. S. 474. Appellant urges that there has here been a misapplication of the there-set-forth standard for determining substantiality of evidence. However, an examination of that case in no wise supports such contention. In the **Universal Camera** case it was held, in effect, that the reviewing Court, in determining whether substantial supporting evidence exists,

may not properly limit its review to that evidence which is favorable to the disposition as made by the administrative agency. It is all too clear in the instant proceeding that the three-judge Court below did not in any sense limit its review, but rather gave careful consideration to the evidence in its entirety. As clearly stated in that Court's decision: "We have carefully read and considered the three-volume transcript of the evidence and the 91 lengthy exhibits, adduced before the Commission." (Appendix to Jurisdictional Statement, Page 37) Actually the case so heavily relied upon by appellant accentuates the soundness and propriety of the three-judge Court's action in the instant proceeding. This is true by reason of the clear indication in the decision itself that all evidence has here been thoroughly considered. Furthermore, in the instant proceeding—unlike the **Universal Camera** case—the recommendations of the hearing Examiner and the disposition of the Commission are in complete harmony, both reaching the same inevitable conclusion on the basis of the weight of convincing evidence of record.

In short, the **Universal Camera** case holds that the reviewing Court must examine the evidence as a whole. The three-judge Court has here clearly and undeniably done just that. Such being the case, there is obviously no justification for further consideration by this Court. The reasoning supporting such conclusion is perhaps best summarized by the following brief exerpt from **Universal Camera Corp. vs. National Labor Relations Board** (1950), 340 U. S. 474, 491:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Patently, the instant situation offers no such occasion for intervention by this Court. Rather, the matter should be disposed of just as was done, for example, in **Louisiana Public Service Commission vs. United States of America and the Interstate Commerce Commission** (1954), 348 U. S. 885. In that very similar proceeding a like attempt to obtain review upon much the same contentions, including the allegation based upon the **Universal Camera** case, was denied and the judgment of the lower Court was affirmed upon motion.

Appellant raises various secondary questions apparently thought of as stemming from the primary premise. Only the briefest individual response is deemed necessary to indicate a consistent absence of substantiality.

Appellant suggests that the Court below erred in recognizing that the evidence, which had formed the basis for the Interstate Commerce Commission grant of comparable increases for interstate application, formed ". . . the natural basis for" the Arkansas Thirteenth Section Order. Such contention is without substance for various reasons. Initially, the observation of the three-judge Court constitutes the clear governing law as expressed in **King vs. United States** (1952), 344 U. S. 254. Secondly, there can be no doubt as to the propriety of the Commission's taking official notice of its own Reports in antecedent interstate proceedings. Thirdly, the Commission's Report and Order in the instant Thirteenth Section proceeding in nowise depends upon evidence outside the record specifically introduced herein. Rather, the voluminous record introduced at the time of hearing before the hearing Examiner contains, insofar as pertinent, much of the same type of material previously submitted in the interstate increase proceeding, and the record so constructed at the three-day hearing provides complete support for each and every finding of the Commission.

In its next secondary contention appellant suggests that the instant record was deficient in that specific expenses of transporting the particular commodities in question in Arkansas intrastate commerce were not presented. It is of course, authoritatively and conclusively settled that in circumstances such as here present, such separation of interstate and intrastate revenues and expenses is neither practical nor necessary. Perhaps the best answer to this particular contention is to be found in the three-judge Court's quotation from **Illinois Commerce Commission vs. United States** (1934), 292 U. S. 475, 483-484, which, in turn cites **American Express Co. vs. Caldwell** (1917), 244 U. S. 617, **United States vs. Louisiana** (1933), 290 U. S. 70 and **Florida vs. United States** (1934), 292 U. S. 1 (Appendix to Jurisdictional Statement, Pages 38-39).

The next contention of appellant in its own words is "Simply stated the proponents did not prove that the operating conditions in Arkansas are different from those in other states or in interstate operations." Such proof, of course, is not part of the respondent rail carriers' burden. It has long been settled beyond question that the required proof is merely a showing that operating conditions in intrastate commerce in the State in question are no less difficult or burdensome than operating conditions in connection with the handling of comparable interstate traffic, **King vs. United States** (1952), 344 U. S. 254, 271. Such proof was here presented in detail and in essentially the same manner which has repeatedly received the stamp of approval of the Commission and the Courts. As a matter of fact, the instant compelling situation enabled the rail carriers to prove that operating conditions as to Arkansas intrastate traffic were, if anything, significantly more difficult than those encountered in the handling of interstate traffic generally. Factors of record which clearly support such conclusion include: testimony that both types of traffic are often intermingled in the same trains; expla-

nations as to intrastate traffic's being handled to a proportionately greater extent in local trains, such handling involving higher costs by reason of relatively greater terminal expenses, higher rates of pay to local train crews, and more overtime expense; and testimony concerning the unique Arkansas full-crew law which adds an extra burden of expense found only in connection with Arkansas intrastate operations. (See, for example, Transcript Pages 119-128, 136-141, 143-145, 185-186 and 220, and Exhibits 24 through 32 and 43). Appellant's urging of an impractical, if not impossible, standard of proof as to this aspect of the case is contrary to all authority and clearly presents nothing of substance.

Appellant next presents an argument surrounding the question of who has the burden of proof. There is no dispute as to this. Respondent rail carriers admittedly have that burden, and in the instant situation it is clear, as properly found by the three-judge Court, that the voluminous and detailed evidence submitted includes substantial evidence supporting every facet of such burden. The features here raised by appellant have so frequently received the most authoritative consideration and are so clearly controlled by existing decisions, including **King vs. United States** (1952), 344 U. S. 254, that further discussion or response is completely unjustified.

In appellant's next secondary contention the question is raised as to whether this is, in fact, a revenue proceeding. In connection with such contention appellant, at Page 15 of its Jurisdictional Statement, draws completely inaccurate and unjustified conclusions from the there-quoted language taken from the three-judge Court decision. What is, in fact, observed by the lower Court is merely that in a proceeding such as the instant one—based upon a statewide general discrimination against interstate commerce—it is not necessary to deal with each of the thousands of individual rates and to show individually that each of such

rates is below a minimum reasonable level or that each individually results in a specific unlawful discrimination against an interstate rate.

The correctness of such statement is clearly established by the **King** case and the cases therein cited. The clear distinction between a "revenue" proceeding and a "rate" proceeding is repeatedly and consistently established by existing authorities, and certainly there is no occasion for further argument in connection therewith. Undeniably the instant proceeding is a revenue proceeding, and without question the standards applicable to such proceeding have here been properly applied.

The last contention of the appellant is, of course, as to the ultimate question: Is there anything here present which warrants further handling before the Supreme Court of the United States? We believe it to be abundantly clear that such question must be answered in the negative. Few, if any, areas of governing law have received so repeated and thorough analysis by our highest Court as has the instant one. The governing principles are already clearly set forth in the cited authority. Further rehashing of such established principles would serve no useful purpose. Contrary to appellant's suggestion, there are no existing conflicts in the law as expressed by the decisions of the several lower Courts. Each decision is necessarily rendered on the facts of record as presented in that particular proceeding. The circumstances that in one given situation the facts presented did not support the requested relief can have no influence whatsoever upon another proceeding such as the instant one, where an entirely different factual situation, as demonstrated by the controlling record, clearly does justify the relief as prayed and as accorded. The argument based on a claim that the involved increases in Arkansas result in rates in Arkansas higher than in Mississippi lacks both substance and relevancy. First of all, it is obvious that the failure

to accord these increases on Arkansas traffic would have created far more numerous disparities between intrastate rates in Arkansas and in other surrounding states. Secondly, the pertinent inquiry is not as to the relationship to intrastate rates in other states, but rather as to the relationship of the intrastate rates in question to interstate rates to, from, and within such State. The relief here accorded does nothing more than eliminate some of the existing unjustified differences between Arkansas intrastate rates and comparable interstate rates.

The alleged benefits which appellant envisions as a result of the requested review are obviously somewhat contrived. Actually, there exists no substantial doubts as to any of the features which appellant urges, for example, at Page 19 of its Jurisdictional Statement. As indicated, this Court has already given full consideration to the various problems posed by situations of this type and pursuant to such consideration, has clearly set forth all the necessary governing principles. Perhaps the best and most recent single treatment is to be found in the **King** case. It is submitted that a consideration of the three-judge Court decision below in the light of that governing decision can but lead to the conclusion that the judgment below correctly disposed of the matter and that further review would be entirely unwarranted.

CONCLUSION.

The Court below has without doubt correctly reviewed the entirety of the evidence before the Interstate Commerce Commission and, based upon such review, has reached the only supportable conclusion. The analysis of the Court below was strictly in accordance with the requirements of **Universal Camera Corp. vs. National Labor Relations Board** (1950), 340 U. S. 474. Appellant raises nothing whatsoever of substance, and hence, presents no justification for further review.

Accordingly, it is respectfully submitted that your honorable Court should dispose of this matter just as it has done in connection with entirely analogous situations, including that involved in **Louisiana Public Service Commission vs. United States of America and the Interstate Commerce Commission** (1954), 348 U. S. 885. Here, just as in that proceeding, the judgment and decree of the three-judge District Court should be affirmed. It is respectfully so moved.

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CLYDE W. FIDDES,
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Of Counsel.

Certificate of Service.

I, Toll R. Ware, one of the attorneys for the rail carrier appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of July, 1957, I served copies of the foregoing Motion to Affirm on interested parties of record, including the following:

1. On the State of Arkansas by mailing copies duly addressed with first-class postage prepaid to their attorneys as shown on the Jurisdictional Statement.

2. On the United States of America by mailing copies in duly addressed envelopes to Osro Cobb, Attorney for the Eastern District of Arkansas, first-class postage prepaid, and to the Solicitor General, Department of Justice, Washington 25, D. C., airmail postage prepaid.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, airmail postage prepaid, to Samuel R. Howell, Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

.....

Toll R. Ware,
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Appellees.

No. 197

In the Supreme Court of the United States

OCTOBER TERM, 1957

ARKANSAS PUBLIC SERVICE COMMISSION, APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 197

ARKANSAS PUBLIC SERVICE COMMISSION, APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

MOTION TO AFFIRM

Appellees United States of America and Interstate Commerce Commission, pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, move that the final judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (convened pursuant to 28 U. S. C. 2284 and 2325) insofar as it upheld the validity of the order of the Commission issued September 4, 1956, in Docket No. 31660, *Arkansas Intrastate Freight Rates and Charges*, reported at 298

I. C. C. 547.[1] The Commission's report is annexed to this motion as an appendix.

The proceeding grew out of and is predicated upon certain general revenue proceedings in which the railroads throughout the United States were authorized to increase their interstate freight rates and charges in order to meet substantially increased operating expenses.[2] The Commission's order here involved authorized the railroads operating in Arkansas to increase their intrastate rates in that State, on certain commodities, to the level of the interstate rates previously authorized by the Commission.

Shortly after the Commission had ordered the general increases in interstate freight rates, the railroads operating in Arkansas requested the Arkansas Public Service Commission to grant similar increases in intrastate rates. The State Commission allowed the increases except on sand and gravel, crushed stone, asphalt rock, coated stone, and related items forming the group of commodities classified for rate purposes

[1] The district court held invalid only that portion of the Commission's order which required an increase in the intrastate rate on crushed stone used for fluxing purposes in the manufacture of aluminum. In all other respects, the district court upheld the Commission's order; however, the court disagreed with the finding of undue preference and prejudice which the Commission said existed with respect to sand and gravel, but nevertheless sustained the order as to those commodities on the ground of undue discrimination against interstate commerce.

[2] These proceedings include:

Ex Parte 166—269 I. C. C. 33, 270 I. C. C. 81, 93, and 403.

Ex Parte 168—272 I. C. C. 695, 276 I. C. C. 9.

Ex Parte 175—280 I. C. C. 179, 281 I. C. C. 557, 284 I. C. C. 589, 289 I. C. C. 395, 292 I. C. C. 23, 297 I. C. C. 17.

and known collectively as road building aggregates, and cement. Appellee railroads then petitioned the Interstate Commerce Commission, pursuant to Section 13 (3) and (4) of the Interstate Commerce Act, for authority to increase the intrastate rates on the excepted commodities.

After extensive hearings, the Commission granted the requested authority on the basis of its findings: (1) that the conditions incident to the intrastate transportation of freight in Arkansas were not more favorable than those incident to the interstate transportation of freight between points in that State and points in adjoining States; (2) that the percentages by which the interstate rates had been increased were just and reasonable; (3) that the existing intrastate rates on the excepted commodities were lower than the interstate rates on the same commodities between points in Arkansas and points in adjoining States; (4) that such intrastate traffic failed to produce its fair share of the revenue required by the railroads to enable them to provide adequate and efficient service; (5) that the intrastate rates were unjustly discriminatory as against interstate commerce; (6) that with respect to sand and gravel the present intrastate rates are causing undue and unreasonable preference and advantage to intrastate shippers and localities and undue and unreasonable prejudice and disadvantage to interstate shippers and localities; (7) that the preference, prejudice, and discrimination should be removed by applying to the intrastate rates the same percentage increases as had been applied to the interstate rates; and (8) that the increases thus made in

the intrastate rates would not result in unjust or un reasonable rates, and would substantially increase th carrier's revenue (*Arkansas Intrastate Freight Rate and Charges, supra,* pp. 560–561).

On review, in an opinion by Mr. Justice (then Cir cuit Judge) Whittaker, the three-judge distric court sustained the Commission's order insofar as i authorized the railroads to increase their intrastat rates on sand and gravel, crushed stone, other road building aggregates and cement, and reversed th Commission with respect to its finding as to crushe stone used for fluxing purposes in the manufactur of aluminum.[3]

ARGUMENT

Section 13 (4) of the Interstate Commerce Act[4] au thorizes the Commission to prescribe new intrastat

[3] No appeal is being taken by the Government from the de cision setting aside the order in part.

[4] Section 13 (4) (49 U. S. C. 13 (4)) reads as follows:

"Whenever in any such investigation the Commission, afte full hearing, finds that any such rate, fare, charge, classifi cation, regulation, or practice causes any undue or unreasonabl advantage, preference, or prejudice as between persons or lo calities in intrastate commerce on the one hand and interstat or foreign commerce on the other hand, or any undue, unrea sonable, or unjust discrimination against interstate or foreig commerce, which is hereby forbidden and declared to be un lawful, it shall prescribe the rate, fare, or charge, or the maxi mum or minimum, or maximum and minimum, thereafter t be charged, and the classification, regulation, or practice there after to be observed, in such manner as, in its judgment, wil remove such advantage, preference, prejudice, or discrimination Such rates, fares, charges, classifications, regulations, and prac tices shall be observed while in effect by the carriers partie to such proceeding affected thereby, the law of any State o the decision or order of any State authority to the contrar notwithstanding."

rates if it finds that existing intrastate rates cause either (1) any undue or unreasonable advantage, preference, or prejudice against persons or localities in interstate commerce, *or* (2) any undue, unreasonable, or unjust discrimination against interstate commerce. Therefore, an order issued by the Commission under Section 13 (4) is valid if it is sustainable upon either of the statutory conditions. See *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 579; *Ohio* v. *United States*, 292 U. S. 498, 501; and *King* v. *United States*, 344 U. S. 254, 269.

In *King* v. *United States, supra*, this Court held (pp. 270–271) that a Commission order, designed to remove unjust discrimination against interstate commerce, which increased Florida intrastate rates to the level of the interstate rates, was supported by findings which were essentially the same as those in the instant case.

1. Appellant urges (Juris. St. 5) that the district court erred in allegedly holding that the Commission may consider the evidence introduced, and findings made, in a Section 15a (2) general revenue case (*Ex Parte* 166, 168, 175) in reaching a determination as to whether a particular rate in a Section 13 (4) case is contributing its fair share of the earnings. The short answer to this contention is that the district court did not so hold.

Preliminarily, the court stated (147 F. Supp. at 463) that it had carefully read and considered the three-volume transcript of the evidence and the 91 lengthy exhibits adduced before the Commission; that "It may be admitted that this evidence, on the

issue of reasonableness of the existing intrastate rates and upon the issue of the rail carriers' needs for the additional revenue to be produced by the increases * * * would perhaps not be sufficient to support a like order in a fully developed rate case"; but that "the purpose of this case is to eliminate a discrimination against interstate commerce by increasing the intrastate rates to the level of the interstate ones" to the end that the interstate rates will bear their fair share of the cost of adequate rail service. The court then stated (p. 463):

> Here the Commission has applied to the Arkansas intrastate rates the same conclusions it reached, in Ex Parte Nos. 166, 168 and 175, as to the need of the rail carriers for increased revenue on a national basis and has distributed the burden within Arkansas on the same lines it followed when estimating the revenues available in the southwestern territory from intrastate as well as interstate operations, as was done in Florida and approved by the Supreme Court in the King case, 344 U. S. at page 272, 73 S. Ct. at page 269, and here, as in that case, "The evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its [Arkansas] order." King case, 344 U. S. at page 272, 73 S. Ct. at page 269.

The court concluded that "we are fully convinced that the evidence adequately supports the Commission's findings as to the need for, and the reasonableness of, the ordered increases in Arkansas intrastate rates as they existed at the time of the hearing before the Commission in March 1955."

Thus, the court below did not hold that, in considering whether a Section 13 (4) finding is supported by sufficient evidence, the evidence introduced in the Section 15a (2) general revenue hearing is to be considered. The court below did not state, nor is there anything in the Commission's report, which would indicate, that the Commission went beyond the record in the instant case and considered the evidence in the Section 15a (2) general increase cases. Rather, the court below simply sustained the Commission's reiteration of its conclusion, reached in the prior general revenue proceedings, that the higher level of interstate rates which it had authorized was necessary to enable the railroads to meet increased operating expenses. Even now, the appellant does not challenge that conclusion.

2. Appellant also contends (Juris. St. 7–9) that the evidence does not support the finding of the Commission that the intrastate rates and charges fail to produce their fair share of the revenue required by the railroads to enable them to provide adequate and efficient service. In support of this contention, appellant asserts (Juris. St. 8) that, even though evidence was introduced to show revenue received, no evidence was introduced to show the expenses attributable to the transportation of the commodities involved or which would reflect the operating ratio; that "before it could be proved that any particular rate of any class of commodity is not contributing its fair share of earnings it must be shown what the particular earnings or profits are for the class of commodity";

and that this could be done only (a) by "comparing the intrastate profit for hauling this particular class of rates with other classes of shipments," and (b) by "the use of operating ratios." Accordingly, appellant concludes that, since the Commission did not compare the expenses attributable to the movement of the commodities here involved with the income derived therefrom, it could not "determine that the rates were not producing a fair profit."

Appellant's real contention is that there must be a separation of interstate and intrastate costs and revenues. It ignores the principle laid down by this court in *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483–484, that:

> Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. * * *

And see *King* v. *United States*, 344 U. S. 254, 273.

It is undisputed that in 1939 the interstate and intrastate rates here involved were on the same level, and that since that date there have been very substantial increases in railroad operating costs. By 1955, the intrastate rates involved were substantially lower than the corresponding interstate rates (298 I. C. C. 553–557). And the Commission (298 I. C. C. 551–552) made detailed findings leading to its conclusion that "Operating conditions in Arkansas are

no more favorable than in or through the adjoining States. In several respects they are less favorable." Appellant expressly concedes that the evidence supports the findings of the Commission from which it drew this conclusion (Juris. St. 9).[5]

3. Another contention made by appellant (Juris. St. 10–13) is that the district court erroneously held that the burden of proving whether the intrastate rates are discriminatory rested upon the plaintiff (appellant) rather than upon the railroads. Appellant bases this contention on the assertion that the court required only "the mere showing of a disparity" between interstate and intrastate rates.

The court, however, made no such holding. As the court noted, the Commission's order predicated upon further express findings that the conditions incident to the intrastate transportation of freight in Arkansas are not more favorable than those incident to interstate transportation between Arkansas and adjoining States, that the related interstate rates are just and reasonable, that the increased intrastate rates ordered by the Commission will not result in unreasonable rates or in rates unreasonable in relation to interstate rates, that the increased intrastate rates will add approximately $1,000,000 to the railroads' revenues, and

[5] Appellant contends (Juris. St. 9–10) this similarity of transportation conditions can be established only by "a comparison of the operating ratios of the interstate operations for these particular commodities with the operating ratios of the intrastate operations." This is mere repetition of the contention, discussed above, that the fair share of revenue to be contributed by intrastate traffic can be determined only after a separation of intrastate and interstate costs and revenues.

that lesser rates would continue to cast an undue burden upon interstate commerce. These and related findings (298 I. C. C. 560–561) fully comply with *King* v. *United States, supra,* and refute the contention that the burden of proof was shifted to appellant.

4. Appellant similarly contends (Juris. St. 14–16) that the district court erroneously held that proof of discrimination is not required in a Section 13 (4) proceeding. According to appellant, "The court, in effect, admitted that there is no evidence in the record to support a finding that the particular class of rates are not contributing a reasonable profit * * *."

The lack of substance in such assertions is readily shown by an examination of the court's opinion. It is clear that the court found that the evidence supported the Commission's finding of discrimination against interstate commerce (147 F. Supp. at 463–464), although it admitted that it may be "that this evidence, on the issue of reasonableness of the existing intrastate rates and upon the issue of the rail carriers' needs for the additional revenue * * * though rather extensive, would perhaps not be sufficient to support a like order in a fully developed rate case". (citing the *King* case, *supra,* and *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 483–484). Under the decisions of this Court, discussed above (*supra,* pp. 5–6), the reasonableness of the increased rates prescribed by the Commission requires no justification in the "rate case" sense, where there are findings, supported by substantial evidence, that the interstate and intrastate rates on the commodities involved were on a parity basis historically, that despite substantial

cost increases the intrastate rates have become substantially lower than the corresponding interstate rates, and that the conditions of intrastate transportation are not more favorable than those of interstate transportation.

5. Appellant's remaining contention (Juris. St. 16–19) is that there is a conflict between the decision below and *Mississippi Public Service Comm.* v. *United States,* 124 F. Supp. 809 (S. D. Miss.), affirmed *per curiam,* 349 U. S. 908. We submit that there is no such conflict. In the *Mississippi* case, the district court found that the evidence in the record, considered as a whole, was insufficient to sustain the Commission's findings. The district court in the instant case found that the evidence supported the Commission's findings.[6]

CONCLUSION

The court below subjected the Commission's order to meticulous review. It is respectfully submitted

[6] There is no more logic in appellant's contention in this respect than there would be in an argument that the *Mississippi* case (affirmed in April 1955) is in conflict with *Louisiana Public Service Comm.* v. *United States,* 125 F. Supp. 180 (E. D. La.), affirmed *per curiam* (November 1954), 348 U. S. 885. The two cases involved similar rate increases on virtually the same commodities. In the former, however, the district court held that the finding that the increased intrastate rates would increase total revenues was *not* supported by substantial evidence; in the *Louisiana* case, the district court held there *was* substantial evidence to support that finding. This Court affirmed both judgments. The *Mississippi* decision, therefore, is no more a controlling precedent in the instant case than is the *Louisiana* decision, or, for that matter, the more recent decision in *North Carolina* v. *United States,* 128 F. Supp. 748 (E. D. N. C.), affirmed *per curiam* (October 1955), 350 U. S. 805, which also upheld an order raising intrastate rates.

that the decision below, insofar as it sustains that order, is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

ROBERT W. GINNANE,
General Counsel,
SAMUEL R. HOWELL,
Associate General Counsel,
Interstate Commerce Commission.

JULY 1957.

APPENDIX

INTERSTATE COMMERCE COMMISSION

No. 31660

ARKANSAS INTRASTATE FREIGHT RATES AND CHARGES

Decided May 7, 1956

Intrastate freight rates and charges in Arkansas on specified commodities found to cause unjust discrimination against interstate commerce, and undue prejudice and preference as between persons and localities in interstate and intrastate commerce. Basis for the removal thereof prescribed.

Clyde W. Fiddes, Ned A. Stewart, R. H. Stahlheber, Joe C. Barrett, A. J. Baumann, Harry E. Boe, A. L. Burford, Wm. E. Davis, W. J. Hickey, Paul V. Lutz, John W. Murphy, and *Toll R. Ware* for respondents.

E. K. Minear for intervener in behalf of respondents.

Lewis M. Robinson, John R. Thompson, H. J. Conley, and *J. C. Murray* for Arkansas Public Service Commission, other departments of the State of Arkansas, and shippers opposing respondents.

L. E. Galaspie, T. C. Taylor, Marion M. Caskie, C. E. Childe, Woodson P. Houghton, Maxwell Caskie, Fletcher D. P. Plumley, Jack A. Williams, Sr., and *William W. Collin, Jr.,* for protestants.

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the protestants, to which the respondents replied, and the issues were argued orally. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

This is an investigation under section 13 (4) of the Interstate Commerce Act concerning the lawfulness of Arkansas intrastate freight rates and charges.[1] In response to a petition filed on October 13, 1954, on behalf of the principal railroads serving Arkansas, we entered upon an investigation for the purpose of determining whether freight rates and charges of the common carriers by railroad, or any of them, operating in Arkansas, for the intrastate transportation of property, made or imposed by the authority of that State, by reason of the failure of such rates and charges to include increases corresponding to those authorized by us for interstate traffic in Ex Parte Nos. 166,[2] 168,[3] and 175,[4] cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate and foreign commerce, on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce;

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[1] Rates, charges, and increases are stated per 100 pounds, unless otherwise indicated.

[2] *Increased Freight Rates, 1947*, 269 I. C. C. 33, 270 I. C. C. 81, 270 I. C. C. 93, 270 I. C. C. 403.

[3] *Increased Freight Rates, 1948*, 272 I. C. C. 695, 276 I. C. C. 9.

[4] *Increased Freight Rates, 1951*, 280 I. C. C. 179, 281 I. C. C. 557, 284 I. C. C. 589, 289 I. C. C. 395, 292 I. C. C. 23, 297 I. C. C. 17.

and, if so, what rates and charges, or what maximum or minimum, or maximum and minimum rates and charges, shall be prescribed to remove any unlawfulness found to exist.

All common carriers by railroad operating in Arkansas subject to our jurisdiction were made respondents. Copies of our order of investigation and notice of hearing were served upon each of them, and upon the State of Arkansas and the Arkansas Public Service Commission, hereinafter called the Arkansas commission.

Representatives of the Arkansas commission, the Arkansas State Highway Commission, the Arkansas State Highway Department, the Aluminum Company of America, the Reynolds Metals Company, the Ideal Cement Company, and various other shipper interests intervened in opposition to the petition of the respondents. The American Limestone Company intervened and presented testimony in support of the respondents.

On December 5, 1946, in Ex Parte No. 162,[3] we authorized for interstate transportation general increases, among others, of 20 percent in the basic rates within western territory, including Arkansas, and between the territory and other territories, except official territory, and 22.5 percent between official territory and points in other territories subject; however, to certain exceptions as maxima or specific increases on commodities described in the appendix to that report. Upon petition of these respondents to the Arkansas commission, they were authorized to make effective corresponding increases on all commodities for intrastate transportation within that State.

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[3] *Increased Railway Rates, Fares, and Charges, 1946*, 266 I. C. C. 537.

Upon our authorization of increases in rates for interstate transportation in Ex Parte Nos. 166, 168, and 175, the respondents likewise sought authority from the Arkansas commission to apply corresponding increases in their intrastate rates and charges applicable on intrastate transportation. That commission, while authorizing most of such increases, excepted entirely or partially the increases on certain commodities. Such excepted items include sand, gravel, and related commodities, crushed stone, agricultural limestone in open-top cars; asphalt rock, stone, et cetera, coated; and silica sand in boxcars. A detailed list of the commodities, and the treatment accorded them by us in Ex Parte Nos. 166, 168, and 175, and by the Arkansas commission, is shown in the appendix hereto.

The respondents estimate that the same increases which we authorized on interstate transportation if made in the intrastate rates would produce additional revenues exceeding $1 million annually.

The Arkansas commission and the other protestants urge that this proceeding is premature in that the respondents have not exhausted their legal efforts to obtain the desired increased rates under the Arkansas statutes, since no appeal was taken to the courts from the adverse orders of that commission. In *Alabama Intrastate Fares, 1948*, 273 I. C. C. 627, 635, we stated that where, as here, a bona fide effort by the respondents has been made to justify the increased charges before the State commission, it is not essential that the State commission make an affirmative finding, citing *Florida* v. *United States*, 282 U. S. 194, 210. Our function in administering section 13 (4) of the act is not that of an appellate tribunal. It appears to us that the respondents have exhausted their remedy before the Arkansas commission, and that the issues raised in their petition are properly before us.

Arkansas economic conditions.—In 1939 the total income payments to individuals in Arkansas were approximately $478,000,000. By 1951 such payments rose to $1,750,000,000, or an increase of 268 percent. The per capita income payments increased from $246 in 1939 to $924 in 1951, or 276 percent. In the United States as a whole the respective increases were 244 and 194 percent for the same periods. The total income payments in Arkansas in 1953 rose to $1,793,000,000, an increase of 275 percent over 1939, and the income payments per capita rose to $939, an increase of 282 percent over 1939. Cash receipts in Arkansas from marketing of livestock, and products, and of crops, rose in the same period from $136,337,000 to $563,298,000, or by 313 percent. The value of all mineral production rose from $29,573,000 in 1939 to $118,693,000 in 1951, an increase of 301 percent. Bank loans increased from $74,700,000 in 1939 to $313,200,000 in 1953, or by 319 percent, and in that period bank deposits increased from $176,500,000 to $944,600,000, or by 435 percent.

Respondent's property investment and revenues.—The gross system property investment, for the several class I railroads serving Arkansas, in road and equipment used in transportation service, plus cost, materials, and supplies, as shown by their books on an average as of the beginning and end of each year (except for 1954, which is shown as of the beginning of the year), was $1,967,325,172 in 1948 and increased each year to $2,270,145,682 in 1954. The net property investment representing gross investment less recorded depreciation and amortization, was $1,614,234,219 in 1948 and increased each year to $1,866,058,308 in 1954. The rates of return on net investments, in percentages, were 5.33 in 1948, 4.16 in 1949, 5.33 in

1950, 4.14 in 951, 5.31 in 1952, 5.13 in 1953, and 4.27 in 1954.

The total operating revenues of the class I railroads serving Arkansas were $659,672,345 in 1948, $585,066,520 in 1949, $639,871,608 in 1950, $702,269,450 in 1951, $741,271,942 in 1952, $729,667,795 in 1953, and $643,274,877 in 1954. Thus, the operating revenues were lower in 1954 than in 1948. The total operating expenses increased from $475,047,923 in 1948 to $480,556,222 in 1954, and the net railway operating income of $85,971,743 in 1948 declined to $79,639,635 in 1954. The operating ratios of these carriers for the years 1948 to 1954, inclusive, percentagewise, were, respectively, 72.01, 74.77, 70.29, 75.02, 71.36, 73.40, and 74.70.

Railroad operating expenses.—Employees' wages and salaries account for over 60 percent of respondents' operating expenses. In 1940, the class I railroads serving Arkansas had an average of 65,922 employees, as compared with 85,627 in 1947 and 79,372 in 1953. The total straight-time compensation aggregated $111,265,357 in 1940, $226,918,370 in 1947, and $315,673,812 in 1953. The average straight-time hourly rate of compensation was 70 cents in 1940, as compared with $1.14 in 1947 and $1.84 in 1953, or an increase in 1947 of 62.86 percent over 1940, which in 1953 had risen to 162.86 percent, a further increase of 61.4 percent over 1947. Since 1953 there has been an additional wage increase of 5 cents an hour to operating employees and also a so-called welfare privilege granted to nonoperating employees.

Expenditures for materials and supplies account for another 30 percent of the respondents' operating expenses. The average unit prices of railway materials and supplies, other than fuel, in 1954 were 148.3 percent higher than in 1940. In that period there

was an increase of 110.5 percent in the price of fuel, and an increase of 132.6 percent in materials and supplies.

In 1939, the ton-mile revenues which accrued to the respondents on all interstate and intrastate traffic averaged 1.016 cents in Arkansas, as compared with 1.021 cents in the western district and 0.973 cent in the United States. In 1953, respective ton-mile revenues were 1.419, 1.431, and 1.478 cents.

As proof that the increased operating ratio was not due to inefficient operations, the respondents presented evidence as to the operating efficiency of the class I railroads serving Arkansas. The average capacity of their freight cars increased from 46.3 tons in 1940 to 50.7 tons in 1952. Similarly, comparing 1940 with 1954 (11 months), the net tons per loaded car increased from 24.4 to 29.3, the average freight trainloads increased from 713 to 1,220 tons, the freight-train speeds per hour increased from 18 to 20.3 miles, and the gross ton-miles per freight-train hour (excluding locomotive and tender) increased from 33,708 to 57,842. It is emphasized that this improved efficiency reflects increased investment in transportation property and equipment. For example, the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), with 26 percent of its mileage in that State, expended $11,053,401 for new equipment and $3,258,881 for rehabilitation of freight cars in 1954. It was estimated that approximately $20,150,000 would be spent for those items in 1955. During the period 1946–54 the Missouri Pacific expended $75,201,911 for additions and betterments to road property and $139,211,414 for equipment, a total of $214,413,325. That carrier in 1952, 1953, and 1954 spent for betterments in Arkansas $1,590,000, $1,637,000, and $1,832,000, respectively, and its improve-

ment program in Arkansas for 1955 was estimated as aggregating $3,300,000.

Intrastate operating conditions.—The evidence shows that both interstate and intrastate traffic is handled in the same types of cars in the same through or local trains, that such traffic moves over the same tracks and through the same terminal yards, and that the same employees handle the shipments irrespective of the proportion of interstate or intrastate traffic. Intrastate traffic usually moves in local trains, which the respondents state results in higher operating costs. Such shipments usually require shorter hauls than interstate shipments, and the terminal expenses incurred in placing empty cars and pulling loaded cars at origin and in placing the cars at destination are relatively larger in proportion to the line-haul revenue derived from these hauls; local train crews are paid at higher rates than the through-freight crews; the local trains incur more overtime; a larger proportion of intrastate traffic is delivered on team tracks requiring more detailed spotting for loading and unloading than does interstate traffic, which usually is placed on the customer's track or at its warehouse; and intrastate traffic moves generally over branch lines which are more expensive to operate and maintain.

Operating conditions in Arkansas are no more favorable than in or through the adjoining States. In several respects they are less favorable. The so-called Arkansas full-crew law requires an additional brakeman in train service, and a third helper on switch engines. This requirement cost the Missouri Pacific $1,169,888 in wages and payroll taxes in 1953. No corresponding cost is encountered elsewhere on the Missouri Pacific's lines. It was pointed out also that because the Missouri Pacific operates parallel to o

across three major rivers in Arkansas, its lines there are subject more than elsewhere to floods, washouts, and other high-water conditions, making it substantially more expensive to operate and maintain. During the period 1941 to 1954 that road was compelled to spend $1,568,728 for flood protection or restoration in Arkansas. Evidence was presented with respect to the ruling grades on the Missouri Pacific's main line and branch lines, indicating that operations in Arkansas are more expensive than other operations on its lines.

For the purpose of showing that both the traffic volume and the revenue therefrom here considered is of substantial importance to the Arkansas railroads, it appears that in 1953 the principal roads originated in Arkansas 3,940,755 tons of interstate and intrastate traffic. This represented 28.86 percent of their total system carload tonnage. The total intrastate volume of this traffic terminated in Arkansas in 1953 was 2,861,736 tons, or 70 percent of the tonnage of these commodities originated in Arkansas.

A 12-month traffic study, covering the period from October 1, 1953, through September 30, 1954, is exhibited to show the revenue loss of the respondents by reason of the refusal of the Arkansas commission to permit increases in freight rates and charges to the same extent as authorized by us in Ex Parte Nos. 166, 168, and 175. This study discloses that of the excepted items, 2,875,148 tons were terminated in Arkansas during the period, on which the actual freight charges were $3,218,791. The full increases authorized in Ex Parte Nos. 166, 168, and 175 for application on interstate traffic if applied to the rates on this intrastate traffic would have produced freight charges of $4,247,665, or $1,028,874 greater than the revenue which accrued.

Sand, gravel, crushed stone, and related commodities.[6]—Of the commodities considered in this proceeding, sand, gravel, crushed stone, agricultural limestone, and related commodities, all of which take the same rates, are the principal ones from the standpoint of volume and revenue to the respondents. Sand, gravel, and crushed stone are used in Arkansas mostly in building highways, and as such these commodities are referred to as road aggregates.

The respondents state that based on their experience the handling costs of crushed stone, sand, and gravel in intrastate movement is greater than that for commodities generally, because of the additional switching required; also, that the equipment used in transporting crushed stone, sand, and gravel is more costly than the boxcars used for most other commodities. A witness testified that the estimated annual maintenance cost for gondola-ballast cars used in such service is $960, as compared with $426 for steel boxcars, and when compared with flatcars and rack cars, the cost is 4 or 5 times greater.

In *Sand, Gravel, Crushed Stone, and Shells,* 155 I. C. C. 247, 284, we prescribed a reasonable maximum distance scale of rates on sand and gravel, crushed stone, agricultural limestone, and related commodities for interstate transportation which the Arkansas commission approved as a basis for intrastate application. The approved scale of rates was effective from October 17, 1929, until December 26, 1939, when the rail carriers voluntarily established a rate scale on a lower basis applicable to both interstate and intrastate traf-

[6] The related commodities are brickbats, crushed brick, broken saggers, crushed tile; chatt, roofing granules, crushed shells; cinders (coal) slag; clay, fire, crude, clay, shale; crushed sewer pipe, lime sludge, oystershell screenings, broken clay retorts, soil, and riprap.

fic. It is that lower scale to which the increases authorized in Ex Parte Nos. 162, 166, 168, and 175 for interstate transportation where applied, and to which the increases here sought are to be added.

For the 12-month test period previously referred to, 2,702,760 tons of sand, gravel, crushed stone, and agricultural limestone moved intrastate. This figure includes crushed stone moved for fluxing purposes, the rates on which are considered later in this report. In 1954, the total movement of crushed stone for fluxing purposes amounted to 744,169 tons. During a test period, July 11 to 17, 1954, intrastate shipments of sand and gravel were made to 48 destinations throughout Arkansas, and intrastate shipments of crushed stone moved to 18 destinations. In the same period, 11 interstate shipments of sand and gravel and 7 interstate shipments of crushed stone moved to destinations in Arkansas. A number of common points of destination are shown for the interstate and intrastate shipments made.

The respondents show actual shipments made during the test week as illustrative of the rate discriminations against interstate traffic and preference of Arkansas intrastate traffic. For example, an interstate shipment of sand and gravel from Fort Gibson, Okla., to Fort Smith, Ark., 69 miles, was charged a rate of $1.09 per ton, as compared with a rate of 80 cents a ton charged on an intrastate shipment from Little Rock to Arkadelphia, Ark., 66.9 miles. The 29-cent disparity is the result of the Arkansas commission's refusal to permit the respondents to apply the same rate increases on the intrastate traffic as were authorized and applied on like interstate traffic. Another example is a shipment from Fort Gibson, to Mansfield, Ark., 100.3 miles, on which a rate of $1.76 per ton was charged, as compared with a rate of $1.28

applicable intrastate from Little Rock to El Dorado, Ark., 131.2 miles. A shipper of sand and gravel located at Doniphan, Mo., about 10 miles from the Missouri-Arkansas State line, in 1947 shipped 70,000 tons into Arkansas; it is said that because of the nonapplication of the general rate increases to competitive Arkansas rates, the volume of this interstate traffic declined to 21,000 tons in 1954.

On shipments of crushed stone from Iron Mountain, Mo., to Osceola, Ark., for example, 189.6 miles, the interstate rate charged was $2.21, as compared with a rate of $1.42 charged on an intrastate movement of the same commodity from Little Rock to Marion, Ark., 130.4 miles. The base rate, including the Ex Parte No. 162 increase, was formerly $1.52 on the interstate movement and $1.34 intrastate, a difference of 18 cents. The present difference is 79 cents, or a net advantage to the intrastate shipper of 61 cents.

For the year 1953 and the first half of 1954, had the proposed increases applied on the crushed stone moved intrastate for highway purposes, additional revenues of $237,186.84 would have accrued. Stated on an annual basis, the revenue loss approximated $158,124.56.

A witness, who operates the principal plant in Arkansas producing crushed stone for highway purposes, testified concerning the revenue loss which, in his opinion, would result if traffic were to be diverted from rail to truck transportation in the event that the increases sought were added to the intrastate rates on crushed stone. He did not testify, however, that any of his shipments would be so diverted. A witness for the Arkansas Highway Department testified that for the year 1954, in his opinion, the gain in revenue to the respondents on the basis of the proposed in-

creases in rates on shipments of sand, crushed stone, and gravel made by that department would have been $159,460.29 for hauls over 50 miles, as compared to a loss of $269,254.81 for hauls of 50 miles or less. In opposing the increases sought on sand, gravel, and asphalt-coated crushed stone, the highway department takes the position that such increases would cause a substantial diversion of this traffic to motortrucks. Under the present rail rates on such road aggregates, the maximum distances for which trucks are used range from 25 to 30 miles. The department estimates that the probable effect of the increases on the use of the intrastate rail rates would be an increase in the range of truck use to 40 miles. The truck charges are shown as 4.5 and 5 cents a ton-mile. On this basis of comparison, the rail rate for a single-line haul of 30 miles is 53 cents a ton, whereas the truck charge for like hauls at 5 cents a ton-mile is $1.50 a ton, and at 4.5 cents is $1.35. If the authorized increases were applied, the single-line rail rate for that distance would become 73 cents. At 40 miles, the present rail rate is 58 cents and the truck charges at 4.5 and 5 cents a ton-mile are $1.80 and $2, respectively. The increased single-line rate proposed is 80 cents. At 100 miles the present rail rate is $1.09, whereas the truck charges at 5 cents a ton-mile would be $5, and at 4.5 cents, $4.50. The proposed increased rate would be $1.50. As distance increases, the spread between the rates and charges on these commodities, motor versus rail, becomes greater in favor of the rails.

Certain protestants, including the Arkansas commission and the Arkansas Highway Department, excepted to the examiner's failure to state certain other expenses, in addition to the line-haul transportation charges, for shipments by rail which are not borne by truck shipments. A typical example of such ad-

ditional expenses per ton by rail is the intrastate movement of crushed stone from Big Rock Stone Quarry to the Jacksonville Air Base, a distance of 21 miles, as follows: Switching, 30 cents; unloading, 20 cents; 1-mile haul to job site, 10 cents; and construction of unloading track, 20 cents. In all the examples shown, the distance involved in moving the sand, gravel, or crushed stone was less than 40 miles. The record shows that, even though the total transportation charges by rail were less than those by truck, frequently truck transportation has been used because of admitted advantages for short hauls. The respondents are depending principally upon the increased revenue obtainable from shipments of 40 miles or over. This is clear from the fact that the average hauls of the rail carriers for sand, gravel, and crushed stone range from 51.5 to 70 miles. With respect to hauls over 40 miles, the truck charges appear to be much higher than the rail line-haul charges, and, even with the proposed increases and attendant costs, it appears that the rail carriers should be able to compete effectively for this traffic.

During the 12-month test period, 18,459 tons of asphalt rock and stone, coated, were terminated in Arkansas. This commodity is also used in road construction and is thus referred to as a road aggregate. The actual revenue accruing to the respondents from this aggregate amounted to $25,098, or about $7,719 less than if the full interstate increases had been in effect on such intrastate traffic. The base intrastate rates in Arkansas on this commodity, prior to the general increases, were lower than the interstate rates. At 10 miles, the single-line-interstate base rate was 77 cents per ton, compared with an intrastate rate of 41 cents a ton. Because of the general increases on interstate traffic, the 77-cent rate became $1.37, while

the intrastate rate has increased from 41 to 56 cents. The respondents do not seek a change in the basic relationship of the interstate and intrastate rates, but rather a restoration of the former relationship by subjecting the intrastate rates to the same general increases that have been applied to the interstate rates.

Agricultural limestone for rate purposes is also included in this commodity group. It is used to improve the soil. The consumption of this commodity is on the increase in Arkansas and is recommended for use by governmental agencies, both Federal and State. A shipper operating a plant at River Mines, Mo., who ships agricultural limestone in open-top cars to Arkansas, testified that his company is in keen competition with shippers located in Arkansas and that since 1951 his company has suffered a 40-percent decline in the volume of shipments to Arkansas because of the disparity between the interstate and the intrastate rates. For joint-line movement, these disparities range from 32 cents per net ton for distances of 50 and over 40 miles to 69 cents for distances of 440 and over 410 miles. The Batesville White Lime Company has plants at Limedale Spur and Myersville Spur, Ark., and ships agricultural limestone to various points in Arkansas. This company competes with the shipper at River Mines, as well as with other interstate shippers. No diversion of future shipments to other modes of transportation was indicated by this intrastate shipper in the event the proposed increases are made effective.

Silica sand.—Silica sand is used chiefly in the manufacture of glass and glassware, and is produced at Guion, Ark., and points in Missouri, Oklahoma, and Texas. This commodity generally moves in boxcars and takes higher rates than ordinary sand moving in

open-top cars. During the 12-month test period, 24,700 tons of silica sand moved intrastate in Arkansas. The revenue therefrom was $57,837, or $23,497 less than if the increases sought had been in effect. On a 100-mile movement of silica sand in boxcars, the present interstate rate would be 54 percent higher than the intrastate rate. Here again, the base rates on intrastate movements are lower than the interstate base rates for comparable hauls, and with the full increases the Arkansas rates would still be below the level of the interstate rates.

No one appeared in opposition to the proposed increases on silica sand.

Cement.—The movement of cement within Arkansas during the 12-month test period amounted to 129,229 tons. Prior to the postwar general increases, the interstate and Arkansas intrastate rates on cement for corresponding hauls were on the same level. The Arkansas commission granted the same increases on cement as we had authorized in Ex Parte Nos. 162, 168, and 175. However, with respect to our authorization in Ex Parte No. 166, the intrastate increase was limited to 10 percent, maximum 4 cents per 100 pounds, rather than the 20-percent increase, maximum 4 cents per 100 pounds, authorized by us on like interstate traffic. Because of this partial increase, the revenue to the railroads was $56,016 less than would have accrued in the 12-month test period had the full increase been in effect on the intrastate shipments of cement made in that period.

The Ideal Cement Company operates the only cement plant in Arkansas. It is located at Okay Junction, on the line of the Graysonia, Nashville & Ashdown Railroad Company, which is owned by the cement company. All cement shipments from this plant move by rail, and the testimony indicates that

the shipper is not equipped for trucking. The present intrastate rates are from 1 cent to 3 cents per 100 pounds, depending upon the mileage block, less than the present interstate rates for like distances.

During the previously mentioned test week, intrastate and interstate shipments of cement were terminated by the respondents at numerous points throughout Arkansas. For the purpose of showing undue prejudice and preference as between intrastate and interstate shippers, the respondents instance shipments from Okay Junction to Dewitt, Ark., and from Marquette, Mo., to Dewitt. The rates on both shipments, with only the Ex Parte No. 162 increase, would have been 22 cents. The rate on the interstate shipment, including the Ex Parte Nos. 166, 168, and 175 increases, was 32 cents, while the rate on the intrastate shipment, because of the 10-percent limitation imposed by the Arkansas commission with respect to the Ex Parte No. 166 increase was 30 cents. A mere disparity in rates is not a valid basis for a finding of undue preference and prejudice. Evidence to sustain a finding that intrastate rates are in violation of section 13 (4) in that, in their relation to interstate rates, they unduly prejudice persons or localities, must be of equal dignity and probative value as evidence necessary to sustain a finding under section 3. *Virginia Intrastate Coal Rates*, 287 I. C. C. 245, 252. No shipper or receiver of interstate shipments of cement testified that it was disadvantaged by reason of the lower intrastate rates on cement.

The Ideal Cement Company opposes any further increase in the intrastate rates. It was admitted that under the increased rates on cement as sought by the respondents there would be an annual increase in the latter's revenues of about $38,760. It compares the Arkansas rate scale with scales of rates on cement

applying in other States and since the Arkansas rates are somewhat higher in some instances, the contention is that no additional increase should be permitted. Substantially the same contention has been urged upon us in prior proceedings of this nature. The determination of the lawfulness of intrastate rates in Arkansas in their relation to interstate rates must be based upon a consideration of the circumstances and conditions as they exist in that State. Comparisons with intrastate rates in other States cannot be accepted as determinative of the lawfulness of the Arkansas intrastate rates. See *Louisiana Interstate Freight Rates and Charges*, 291 I. C. C. 279, 288.

Other testimony of protestants.—In denying the increases sought on the excepted commodities here considered, the Arkansas commission concluded that such increases would result in reductions rather than increases in the respondents' revenues. It is contended by the other protestants that unjust discrimination against interstate commerce has not been proven, at least as to sand, crushed stone, and gravel; that the voluntary action of the respondents, or some of them, in providing low commodity rates within the States of Texas and Missouri has the effect of retarding the industrial development of Arkansas to the advantage of those States; and that due consideration of the effect of the intrastate rates in Texas and Missouri will not permit us to require establishment of rates on the interstate levels within Arkansas.

The Aluminum Company of America and the Reynolds Metal Company use large volumes of crushed stone as a fluxing agent in refining crude ore in the production of aluminum at Bauxite Junction, Ark. Such crushed stone is produced at Myersville Spur and Limedale Spur. Their position is that crushed stone, when moving for fluxing purposes, should have

a lower base rate than crushed stone when moving for highway construction. They state that fluxing limestone is a physically different form of limestone than crushed stone used as a road aggregate, and that it is a lower grade, lower priced, heavier loading commodity, and moves in much larger and more regular volume than the road-aggregate stone. The Aluminum Company of America urges that a reasonable rate on fluxing stone from Myersville Spur to Bauxite Junction would be $1.3216 per ton, which is on the level of the Texas rates on fluxing and other industrial stone, and includes all authorized increases. That rate is compared with the present rate of $1.37 and the proposed rate of $1.87 on crushed stone.

No separate classification for fluxing stone is provided in the respondents' Arkansas intrastate tariffs, nor in their interstate tariffs publishing rates to and from Arkansas. The same rates apply as on crushed stone. Whether or not a separate classification should be provided on this commodity within Arkansas presents an issue which we understand is now pending in a complaint proceeding before the Arkansas commission, and which is beyond the scope of this proceeding.

The Reynolds Metals Company states that the present rates on crushed stone, under which fluxing stone moves in Arkansas, are abnormally high when compared with intrastate rates on fluxing stone in other States and with interstate rates to and within the same general territory. There is no indication that the intrastate rates as proposed would exceed those maintained on interstate shipments of crushed stone generally in this territory. It is shown that the respondents are being deprived of at least $370,585 annually on Arkansas intrastate shipments of crushed stone moving for fluxing purposes. The aggregate

annual tonnage of this commodity from Limedale Spur and Myersville Spur to Bauxite Junction, 153 miles, exceeds 730,000 tons. The average load per car is about 76 tons. Crushed stone used for fluxing purposes moves in multiple-car lots and in regular volume throughout the year. All of the movement of crushed stone for fluxing purposes is by rail, and a witness for the protestants stated that it would not be economically feasible to use trucks for its transportation. Prior to the authorized increases as applied on interstate traffic, the rates on crushed stone, both interstate and intrastate, were on the same level.

Respondents' position in general.—It is the respondents' position that Arkansas intrastate traffic has the ability to bear the full increases sought to the same extent as interstate traffic to, from, and through points in that State, and that no justification exists for the failure of this Arkansas traffic to bear its fair share of the national transportation burden. They urge that they should be permitted to exercise managerial discretion in maintaining, as far as practicable, uniformity in the rate structure both as to their interstate and intrastate rates in order to effect an equitable distribution of the transportation burden, and that the revenue loss being sustained, because these commodities have been denied the full interstate increases, is of such magnitude as to cast a substantial burden upon respondents' interstate operations, to a degree that makes the discrimination undue, unreasonable, and unjust.

General discussion.—The respondents are seeking to secure from Arkansas intrastate freight traffic a contribution to maintenance and operating expenses more nearly proportionate to the contribution made by that traffic before the Ex Parte Nos. 166, 168, and 175 increases were authorized. The intrastate rates in-

creased as proposed would in no instance, so far as appears, exceed the level of the interstate rates to, from, or through points in Arkansas. The protestants contend that the present intrastate rates are just and reasonable, and that to increase the intrastate rates as proposed would cause some diversion of shipments to the motor trucks. As proof that additional revenues would be realized under their proposal, the respondents refer to statistics showing the tonnage of the principal Arkansas carriers and the revenues derived therefrom for the year 1946 as compared to the following successive years through 1953. The final 20-percent increases authorized in Ex Parte No. 162 did not become effective until January 1, 1947. As hereinbefore stated, corresponding ~~increases were~~ authorized for Arkansas intrastate transportation, without exception. From such a comparison, it appears that both the tonnages and the revenues for the later years show an increase over the year 1946 despite the increased rates that became effective on January 1, 1947.

The Arkansas commission, in excepting the instant commodities from the increases, did not find that the carriers were not in need of additional revenues, nor that the proposed rates would be unreasonable, but that, in its opinion, the additional revenues would not materialize. On the basis of the record before us, we cannot share in that opinion. As stated, it is estimated by the respondents that the proposed increases will amount to at least $1 million annually. While an aggregate annual increase in revenue may not materialize to the full extent anticipated by them, the record is convincing that their revenue position, under the increases on each commodity as proposed, would improve substantially.

The evidence is persuasive that Arkansas intrastate traffic is no less able to bear the full increases sought than interstate traffic to, from, and through Arkansas. The increases thus sought on Arkansas traffic are a part of the nationwide increases which were authorized in Ex Parte Nos. 166, 168, and 175, and made effective on interstate rail traffic throughout the country, including that to, from, and through Arkansas, and which has been authorized and made effective also on intrastate traffic generally within most of the States. The carriers' need for additional revenue to meet increased operating expenses, as found in those proceedings, was the underlying basis for the increases authorized. These increased operating costs were not confined to interstate traffic, but were and are incurred also on Arkansas intrastate traffic. To the extent that the intrastate traffic fails to bear its fair proportionate share of the increased operating expense by providing additional revenue commensurate with that now provided by the interstate traffic, it places an undue burden upon interstate commerce.

Findings and conclusions.—We find and conclude that:

1. The conditions incident to the intrastate transportation of freight in Arkansas are not more favorable than those incident to the interstate transportation between Arkansas and adjoining States.

2. The amounts and percentages by which interstate freight rates and charges between points in Arkansas and points in adjoining States were increased, as authorized in Ex Parte Nos. 166, 168, and 175, are just and reasonable.

3. The present Arkansas intrastate rates and charges on the commodities listed in the appendix hereto, imposed by authority of the State, are generally on a lower level than the interstate rates and

arges, and traffic moving thereunder fails to pro-
ce its fair share of the earnings required to yield
venue sufficient to enable the respondents, under
nest, economical, and efficient management, to pro-
le adequate and efficient railway transportation
rvice at the lowest cost consistent with the furnish-
g of such service, and thereby accomplish the pur-
se of the act, as set forth in the national trans-
rtation policy declared by the Congress, to develop
d preserve a national transportation system ade-
ate to meet the needs of the commerce of the
nited States, of the postal service, and of the na-
nal defense; the burden thus cast upon interstate
mmerce is undue in and to the extent that these
rastate rates and charges are less than they would
on the bases herein approved; and these intrastate
tes and charges cause, and for the future will
use, undue, unreasonable, and unjust discrimination
ainst interstate commerce.

4. With respect to sand and gravel, and agricultural
nestone, the evidence establishes that there is active
mpetition between persons and localities engaged
interstate commerce between points in Arkansas
d points in other States, on the one hand, and per-
ns and localities engaged in intrastate commerce in
rkansas, on the other, and that the existing dispari-
s between the current interstate and intrastate rates
these commodities cause undue and unreasonable
vantage to and preference of intrastate shippers
d localities, and undue and unreasonable prejudice
d disadvantage to interstate shippers and localities.

5. The undue and unreasonable advantage, prefer-
re, and prejudice, and the undue, unreasonable, and
just discrimination herein found to exist should be
moved by applying to the Arkansas intrastate rates
d charges on the commodities embraced herein, the

same respective increases as are, and for the future may be, maintained by the respondents on like interstate traffic between points in Arkansas and adjoining States under our authorizations in Ex Parte Nos. 166, 168, and 175.

6. The establishment of increases in intrastate rates and charges provided in finding 5 will not result in unreasonable rates or charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase respondents' revenues by approximately $1 million annually.

7. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 5 are required from intrastate traffic in Arkansas in order to enable the respondents to furnish adequate and efficient railway transportation service.

The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of Arkansas, or of any other interested party, to apply for a modification thereof as to any individual intrastate rate or charge affected thereby, on the ground that such rate or charge is not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

An order carrying into effect the foregoing findings and conclusions will be entered, unless this Commission is notified by the Arkansas commission, within 30 days from the date of the service of this report, that it will permit the increases required to remove the unlawfulness herein found to exist.

HUTCHINSON, *Commissioner*, concurring:

I concur in the affirmative findings in the report. However, I would also find that the intrastate rates on cement cause undue and unreasonable advantage to and preference of intrastate shippers and localities, and undue and unreasonable prejudice and disadvantage to interstate shippers and localities. The Commission has made such findings in a number of cases upon evidence no more detailed than that in the present record. See, for example, *North Carolina Intrastate Freight Rates and Charges*, 293 I. C. C. 541, wherein affirmative findings of undue prejudice were made as to several commodities upon a showing that both interstate and intrastate shipments were made to the same destinations within the State. Similar findings are warranted here.

I am authorized to state that Commissioners JOHNSON and MITCHELL concur in this expression.

Commissioner FREAS dissents.

Commissioner WALRATH did not participate in the disposition of this proceeding.

APPENDIX

Specific exceptions to the increases authorized in Ex Parte Nos. 166, 168, and 175 on Arkansas intrastate traffic

Commodities on which exceptions were made		Ex Parte No. 166 increase		Ex Parte No. 168 increase		Ex Parte No. 175 increase	
		Intrastate	Interstate	Intrastate	Interstate	Intrastate	Interstate
		Percent	*Percent*		*Percent*	*Percent*	*Percent*
Sand and gravel, crushed stone, agricultural limestone	Open cars	No increase	20, maximum 1.5 cents [1]	No increase	8	6	12
	Closed cars	No increase	20, maximum 3 cents [1]	No increase	8	[2]	[2]
Brickbats, crushed brick, broken saggers, crushed tile	Open or closed cars	No increase	20, maximum 6 cents [1]	No increase	8	[2]	[2]
Chatt, roofing granules, crushed shells	Open cars	No increase	20, maximum 1.5 cents [1]	No increase	8	[2]	[2]
	Closed cars	No increase	20, maximum 3 cents [1]	No increase	8	[2]	[2]
Cinders (coal), slag	Open or closed cars	No increase	20, maximum 1.5 cents [1]	No increase	8	[2]	[2]
Clay, fire, crude, clay, shale	Open cars	No increase	20, maximum 1.5 cents [1]	No increase	8	[2]	[2]
	Closed cars	No increase	20, maximum 6 cents [1]	No increase	8	[2]	[2]
Crushed sewer pipe, lime sludge, oyster-shell screenings, broken clay retorts, soil	Open or closed cars	No increase	20	No increase	8	[2]	[2]
Silica sand	Open cars	No increase	20, maximum 1.5 cents [1]	No increase	8	6	12
	Closed cars	No increase	20, maximum 3 cents [1]	No increase	8	6	15
Riprap	Open cars	No increase	20, maximum 1.5 cents [1]	No increase	8	[2]	[2]
	Closed cars	No increase	20	No increase	8	[2]	[2]
Asphalt rock, coated, stone, coated	Open or closed cars	No increase	20, maximum 3 cents [1]	No increase	8	[2]	[2]
Cement	Open or closed cars	10, maximum 4 cents [1]	20, maximum 4 cents [1]	[2]	[2]	[2]	[2]

[1] Per 100 pounds.
[2] No exception made on Arkansas intrastate traffic.

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